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UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Appellant,

versus

No. .....

MRS. NANNIE MAY WILLIAMS,

Appellee.

APPEALED from the District Court of the United State for the Northern District of Texas, at San Angelo.

CAPTION.

United States Circuit Court of Appeals for the Fifth Circuit.

The Union Central Life Insurance Company, Appellant,

vs. No. .....

Mrs. Nannie May Williams, Appellee.

TRANSCRIPT OF RECORD.

BE IT REMEMBERED, That at a term of the District Court of the United States in and for the Northern District of Texas, at San Angelo, Texas, begun and holden at San Angelo, on Monday, October 17th, 1932, and which term adjourned on October 27th, 1932, the Honorable William H. Atwell, the regular Judge of said Court presiding, the following proceedings were regularly had in cause Number 269 at Law in said Court, styled "Mrs. Nannie May Williams versus The Union Central Life Insurance Company":

2 TRANSCRIPT FROM THE STATE COURT.

Filed April 8, 1932.

In the District Court of Irion County, Texas.
March Term, A. D. 1932.

The State of Texas,
County of Irion.

To the Hon. J. F. Sutton, Judge of said Court:

Mrs. Nannie May Williams, Plaintiff, complaining of The Union Central Life Insurance Company, Defendant, shows to the Court:

First:

The plaintiff resides in Irion County, Texas, and is the widow of P. H. Williams, deceased, the said P. H. Williams being designated in the policy hereinafter referred to under his full name, Peter Hardy Williams; that he died in Tom Green County, Texas, on October 15, 1931.

Second:

That defendant is a foreign life insurance company, a private corporation, duly incorporated under the laws of the State of Ohio, with its home office in the City of Cincinnati, in said state, and is now, and was, at all times herein mentioned, engaged in the business of writing and issuing policies of life insurance under the laws of and in the State of Texas as an old line (legal reserve) company with a permit to transact said business in the State of Texas. That said company has no local agent in Irion County, Texas; that it has

a local agent in Tom Green County, Texas, same being Charles A. Poteet; that defendant may be cited by serving its said local agent in Tom Green County, Texas.

Third:

That heretofore, to-wit: On the 26th day of July, 1927, defendant issued its policy No. 940457, on the life of the said P. H. Williams, designated in said policy under his full name of Peter Hardy Williams, in and under which policy the said company so issuing same agreed to pay to this plaintiff named as beneficiary therein, the sum of Ten Thousand Dollars ($10,000.00) payable on receipt of due proof of the death of said insured, less any indebtedness and advances on said policy and any unpaid portion of the premium for the current policy year. That
3 the application for said policy was made to the said local agent of defendant in Tom Green County, Texas, and that said policy was delivered to the said P. H. Williams in Tom Green County, Texas, by the said local agent. That on the date of the issuance of said policy plaintiff was the legal wife of the said P. H. Williams and said marriage relation continued until it was terminated by his death as aforesaid.

Fourth:

That all premiums on said policy for and throughout the first four policy years, were duly and fully paid under and in accordance with the provisions and terms of said policy; that at least five-twelfths (5/12) of the premium for the fifth policy year was duly paid, satisfied and discharged under and in accordance with the terms and provisions of said policy, and said policy was in full force and effect upon the date of the

death of the said P. H. Williams, as an undertaking, contract and obligation of defendant, effective for, and inuring to, the benefit of plaintiff.

In this connection, plaintiff shows to the Court that said policy of insurance was taken out by the said P. H. Williams solely for her benefit, which fact was well-known to defendant; that upon the payment of the premium for the first policy year, said policy immediately became a contract and obligation of defendant, effective for, and inuring to, the sole benefit of plaintiff; that said first annual premium was paid upon the date of the issuance of said policy and the rights of plaintiff therein became vested thereupon; that said policy and all premiums thereon, paid by the said P. H. Williams, and all accretions thereon, were a gift from her said husband to plaintiff; and said policy, including all rights thereunder from the date of issuance thereof, constituted separate property of plaintiff under the constitution and laws of the State of Texas. That said contract of insurance is what is known as a participating policy.

Fifth:

That on or about November 4, 1931, plaintiff by her Attorney, Charles Gibbs, formally notified defendant of the death of the said P. H. Williams, and requested that defendant send her proper form for making proof of death under said policy. That on or about November 12, 1931, defendant notified plaintiff, through a communication to said attorney, that it did not recognize any liability under such policy; that proof of death would not be required; that said policy was not in force at the date of the death of the said P. H. Williams.

Plaintiff shows to the Court that said policy does not stipulate how due proof of death therein referred

to should be made, or on what form same should be submitted; and she accordingly, on said date of November 4, 1931, requested the defendant to furnish proper form for said purpose. That she was able, ready and willing to furnish to defendant proof of the death of the said P. H. Williams on any form defendant might elect to have used for said purpose but that after defendant so notified her of its contention that said policy was not in force at the date of the death of the said P. H. Williams, it would have been an idle ceremony for her to make out and send in any proof of any kind, and such procedure could have served no purpose whatsoever; and accordingly, plaintiff did not submit any proof of death on any company form.

In this connection, she shows to the Court that defendant did not, at that time, contend and has never contended that there was any question about the death of the said P. H. Williams. On the contrary, defendant had actual notice of his death within 24 hours thereafter, and has predicated its denial of liability to this plaintiff as beneficiary under said policy, solely on the contention that the policy was not in force at the time of the death of Mr. Williams, contending that it had been forfeited for non-payment of premium, and said defendant has at all times since the date of his said death, made said contention, and has at all times denied any liability to this plaintiff solely on said claim.

Sixth.

That said communication dated November 4, 1931, from her said attorney to said defendant was not only a request for death forms as aforesaid, but was also, and was so intended by her and so construed by defendant, as a demand for the payment to her of the face amount of said policy, to-wit: The sum of Ten Thou-

sand Dollars ($10,000.00) less all lawful and valid indebtedness and advances thereon and any unpaid portion of the premium for the current policy year.

5 Seventh:

That on said date in November. 1931, when defendant so disclaimed liability to her, as beneficiary under said policy, plaintiff did not have available and could not locate all of the documents, receipts and communications that the said P. H. Williams had acquired or received in connection with or relating to said policy; and in this connection, she alleges that she had been engaged in large business activities and in various enterprises with which plaintiff was unfamiliar, and some of the said documents and communications and receipts had been misplaced among other papers relating to other transactions, and plaintiff could not locate same; and she accordingly employed the attorneys whose names are signed hereto to make a search for and investigation thereof for the purpose of protecting her rights and advising her with reference thereto; that she has likewise employed said attorneys to institute and bring to a final conclusion this litigation; that said work has necessitated said attorneys giving considerable time and attention thereto; that it will be necessary for said attorneys to devote hereafter a great deal of time and attention to this litigation to combat the contentions based upon technicalities which defendant has intimated that it will enterpose to this suit; and in all probability this litigation will be carried to the Court of last resort—by plaintiff's attorneys, if necessary, to bring this action to a final and successful termination:—by defendant, if plaintiff should prevail in the trial Court.

In this connection, plaintiff shows to the Court that she is without funds or resources, and said attorneys

will have to advance their own money for expenses in connection with and incident to their appearances in the various Courts, the preparation and compiling of briefs, and traveling expenses; that said employment in all its phases was and is necessary for the assertion and protection of her said rights.

6 That in view of all the foregoing facts and circumstances and in view of all the benefits to plaintiff incident to the prosecution of this suit, accrued and to accrue on account of such policy, the sum of Four Thousand Dollars ($4,000.00) is a reasonable attorney's fee for the prosecution and collection of such loss.

Eighth:

That defendant has in its possession the original of said policy; and is hereby notified to produce same on the trial of this cause; failing to do which secondary evidence will be used to establish same. This notice also applies to and includes all letters, correspondence, documents and receipts relating to said policy or relating to any and all transactions in connection with same, between the said P. H. Williams and said Company, its agents and representatives; also to said letter dated November 4, 1931, hereinabove referred to.

Wherefore, plaintiff prays that defendant be cited to appear and answer herein; that this cause be set down for trial and that on hearing hereof, plaintiff have judgment against defendant for the sum of Ten Thousand Dollars ($10,000.00) less all lawful and valid indebtedness and advances on said policy and any unpaid portion of the premium for the current policy year—said lawful and valid indebtedness and advances being in the amount of Seven Hundred, Eighty-three and 13/100 Dollars ($783.13), and said unpaid portion of

the premium for the current policy year being two hundred sixty-one and 98/100 Dollars ($261.98)—the difference between the said face value of the policy and the said amounts to be deducted therefrom being Eight Thousand, Nine Hundred, Fifty-four and 89/100 Dollars ($8,954.89); and in addition thereto—under and in accordance with the provisions of Article 4736, revised civil statutes of the State of Texas, 1925, as amended by the Acts of 1931, 42nd Legislature, page 135, Chapter 91, Section 1,—twelve per cent (12%) damages on the amount of such loss, together with a reasonable attorney's fee, for the protection
7 and collection of such loss; in all, the sum of Fourteen Thousand, Twenty-nine and 47/100 Dollars, ($14,029.47); for costs of suit (said reasonable attorney's fee to be taxed as a part thereof); and relief, general and equitable.

CHAS. GIBBS,
J. W. STOVALL,
H. O. WILLIAMS,
Attorney's for Plaintiff.

Indorsed: No. 468, In the District Court of Irion County, Texas. Mrs. Nannie May Williams v. The Union Central Life Insurance Co. Plaintiff's Original Petition. Chas. Gibbs, J. W. Stovall and H. O. Williams, San Angelo, Texas, Attorneys for Plaintiff. Filed this 29th day of Feb., 1932. Hettie Whitaker, District Clerk, Irion County, Texas.

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8 PETITION FOR REMOVAL.

In the District Court of Irion County, Texas.

Mrs. Nannie May Williams,

vs. No. 468.

The Union Central Life Insurance Company.

To the Honorable District Court in and for Irion County, Texas:

Now, by its attorneys, comes your petitioner, The Union Central Life Insurance Company, defendant in the above styled cause, and respectfully shows to this Honorable Court that this is a suit of a civil nature at law, in which the District Court of the United States for the Northern District of Texas, San Angelo Division, is given jurisdiction by the Judicial Code, title, "The Judiciary", and your petitioner makes and files this, its petition and bond, conditioned as required by law, for the purpose of removing said suit from this Court into the District Court of the United States for the Northern District of Texas, San Angelo Division, and thereupon your petitioner says:

1. Your petitioner, defendant in this suit, under the laws of the State of Texas and the rules of said District Court of Irion County, Texas, in which said suit is brought is required to answer and plead to the petition of the plaintiff on or before the call of the appearance docket of the said Court on the 15th day of March, 1932, and, therefore, the time has not elapsed within which your petitioner is required by the laws of the State of Texas and the rules and practice of said District Court of Irion County, Texas, to answer, plead or demur to the plaintiff's petition, nor has your petitioner, the defendant in said cause, in any manner waived its right to remove said suit into the District Court of the United States.

2. There is a controversy in said suit, and said controversy is between citizens of different states, and the plaintiff in said suit, to-wit: Mrs. Nannie May Williams was at the commencement of said suit, since has been, and still is, a resident and citizen of the State of Texas, having her residence and domicile in the County of Irion, in the Northern District of Texas, in which County the said suit is pending, and your

petitioner, The Union Central Life Insurance Company, defendant in said suit, was at the commencement of said suit, since has been and still is, a corporation duly organized and incorporated and existing under and by virtue of the laws of the State of Ohio, and a citizen, resident and inhabitant of the State of Ohio, and a non-resident of the State of Texas, and the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

3. By reason of the premises, your petitioner, said defendant, desires and is entitled to have said suit removed from said District Court of Irion County, Texas, into the District Court of the United States for proper district. The District Court of the United States for the Northern District of Texas, San Angelo Division, is the District Court of the United States for the proper district and division in which said suit is pending.

4. Your petitioner now here makes and files with this, its petition for removal, a bond in the sum of Five Hundred Dollars ($500.00), with good and sufficient surety, conditioned for its entering in the District Court of the United States for the Northern District of Texas, San Angelo Division, within thirty days from the date of filing this its petition, a
10 certified copy of the record in said suit and for paying all costs that may be awarded by the said District Court, if the said District Court shall hold that the said suit was wrongfully or improperly removed thereto, and also for its appearing and entering special plea in said suit, if special plea was originally requisite therein and your petitioner has given to the adverse parties notice of this petition and bond for removal prior to the filing of the same.

Your petitioner, therefore, prays this Honorable Court to accept its petition and said bond, and to pro-

ceed no further in said suit except to make an order removing said suit to the United States District Court for the Northern District of Texas, San Angelo Division, and to direct that a certified copy of the record herein be made for said Court as required by law.

And as in duty bound your petitioner will ever pray.

THE UNION CENTRAL LIFE INSURANCE COMPANY,
By LOCKE, LOCKE, STROUD & RANDOLPH,
RALPH RANDOLPH,
Its Attorneys.

The State of Texas,
County of Tom Green.

Ralph Randolph, of lawful age, being first duly sworn, deposes and says that The Union Central Life Insurance Company, the petitioner above named, is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and is a resident, citizen and inhabitant of said State of Ohio; that he is one of the attorneys for said corporation in this suit, and as such has authority to make this affidavit and that he has read the foregoing petition, and the statements therein contained are true.

RALPH RANDOLPH.

11 Subscribed and sworn to before me this 14th day of March, A. D. 1932.

LYNETTE MIERS,
(Seal) Notary Public, Tom Green County, Texas.

Indorsed: No. 468, Mrs. Nannie May Williams, Plaintiff. vs. The Union Central Life Insurance Company, Defendant. Petition for Removal. Filed: This 14th day of March, 1932, Hettie Whitaker, District Clerk, Irion County, Texas.

12 In the District Court of Irion County, Texas.

Mrs. Nannie May Williams, Plaintiff,

vs. No. 468.

The Union Central Life Insurance Company, Defendant.

Know all men by these presents: That we, The Union Central Life Insurance Company, a corporation organized and duly incorporated under and by virtue of the laws of the State of Ohio, and principal, and Great American Indemnity Company, a corporation of the City of New York, State of New York, admitted and having a permit to do a surety business in the State of Texas, as surety, are held and firmly bound, and by these presents do jointly and severally bind ourselves and our several successors and assigns, unto Mrs. Nannie May Williams, plaintiff in the above styled action, in the sum of Five Hundred Dollars ($500.00) lawful money of the United States, for the payment whereof, well and truly to be made, we bind ourselves and our successors and assigns, jointly and severally, by these presents.

The condition of this obligation is such that whereas the said defendant, The Union Central Life Insurance Company, has applied by petition to the District Court of Irion County, Texas, for the removal of the above entitled cause therein pending to the District Court of the United States for the Northern District of Texas, San Angelo Division.

Now, therefore, if the said The Union Central Life Insurance Company shall enter in said District Court of the United States within thirty days from the date of filing its said petition for removal of said cause a certified copy of the record in said suit, and

13 shall pay all costs that may be awarded by the said District Court of the United States for the Northern District of Texas, San Angelo Division, if said Court shall hold that said suit was wrong-

fully or improperly removed thereto, and it shall also appear and enter bail in such suit, if special bail was originally requisite therein, then this obligation shall be void; otherwise it shall remain in full force and effect.

THE UNION CENTRAL LIFE INSURANCE COMPANY,
By LOCKE, LOCKE, STROUD & RANDOLPH,
Its Attorneys.
GREAT AMERICAN INDEMNITY CO.,
(Corporate Seal)
TOM P. ELLIS,
Its Attorney-in-Fact thereunto duly authorized.

The foregoing bond and surety thereon approved by me this 14th day of March, 1932.

JOHN F. SUTTON,
Judge of the District Court of Irion County, Texas.

Indorsed: No. 468, Mrs. Nannie May Williams, Plaintiff, vs. The Union Central Life Insurance Company, Defendant. Removal Bond. Filed this 14th day of March, 1932. Hettie Whitaker, District Clerk, Irion County, Texas.

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14 NOTICE OF INTENTION TO REMOVE CAUSE.

In the District Court of Irion County, Texas.

Mrs. Nannie May Williams, Plaintiff,
vs. No. 468.
The Union Central Life Insurance Company, Defendant.

To Mrs. Nannie May Williams and Charles Gibbs, her Attorney of Record, at San Angelo, Texas:

Please take notice that at 10:30 o'clock in the forenoon of Monday the 14th day of March, 1932, or as soon thereafter as counsel can be heard at Sherwood, Texas, or wherever the Judge of the District Court of Irion County, Texas, may be found, the defendant, The Union Central Life Insurance Company, will present to said Judge its petition and bond whereof copies are annexed hereto, and will ask for an order removing the above styled cause to the District Court of the United States for the Northern District of Texas, San Angelo Division, at San Angelo, Texas.

LOCKE, LOCKE, STROUD & RANDOLPH,
RALPH RANDOLPH,
Attorneys for Defendant.

Service of the foregoing notice is hereby acknowledged this 14th day of March, 1932, at 9 o'clock A. M.

CHAS. GIBBS,
Attorney for Plaintiff.

15 Indorsed: No. 468: Mrs. Nannie May Williams v. The Union Central Life Insurance Company. Notice of Intention to Remove to Federal Court. Filed this 14th day of March, 1932. Hettie Whitaker, District Clerk, Irion County, Texas.

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16 ORDER OF REMOVAL.

In the District Court of Irion County, Texas.

Mrs. Nannie May Williams, Plaintiff,
vs. No. 468.
The Union Central Life Insurance Company, Defendant.

On this the 14 day of March, 1932, came on to be heard the petition of the defendant, The Union Central

Life Insurance Company, for removal of the above styled cause to the District Court of the United States. And it appearing to the Court that the said cause is one proper to be removed by said defendant and that said petition is sufficient in law, and that the defendant has duly filed therewith a bond conditioned as required by law, signed by itself as principal, and by Great American Indemnity Company as surety, which company is a good and sufficient surety, and that written notice of said petition and bond was given to plaintiff prior to filing same, it therefore is ordered by the Court that said petition and bond be, and hereby they are approved by the Court, and that said cause be removed to the District Court of the United States for the Northern District of Texas, San Angelo Division, at San Angelo, Texas, and that this Court proceed no further therein, and that the Clerk of this Court forthwith make up a certified copy of the record of said cause for use in said District Court of the United States and deliver the same to the attorneys for the defendant.

JOHN F. SUTTON,
17 Judge of the District Court
of Irion County, Tex.

Indorsed: No. 468, Mrs. Nannie May Williams, Plaintiff, vs. The Union Central Life Insurance Company, Defendant. Order for Removal. Filed this 14th day of March, 1932, Hettie Whitaker, District Clerk, Irion County, Texas.

The State of Texas,
County of Irion.

I, Hettie Whitaker, Clerk of the District Court of Irion County, Texas, hereby certify the above and foregoing 14 pages to be a full, true and correct copy of the record and the whole thereof, in the above en-

titled suit heretofore pending in the District Court of Irion County, Texas, being suit No. 468, wherein Mrs. Nannie May Williams is plaintiff and The Union Central Life Insurance Company, a corporation, is defendant; said record consisting of the Original Petition filed by plaintiff in said suit on the 29th day of February, 1932, as shown at pages 1 to 5, both inclusive; the citation and return thereon filed in said suit on March 14, 1932, and shown at pages 6 to 7, both inclusive; the petition for removal of said suit to the United States District Court for the Northern District of Texas, San Angelo Division, filed by said defendant in said suit on March 14, 1932, and shown at pages 8 to 10, both inclusive; the bond for removal of said suit to the said United States District Court filed by said defendant with said petition on March 14, 1932, and shown at pages 11 to 12, both inclusive; the notice of intention to remove said cause and acknowledgment of service of the same filed by said defendant with said petition and bond on March 14, 1932, and shown at page 13 inclusive; and the order approving said petition and bond entered of record in said suit on the 18th day of March, A. D. 1932, and shown at page 14; all as appearing in the file and as of record in my office.

18

In witness whereof I hereunto set my hand and affix the seal of said District Court of Irion County, Texas, this 18th day of March, 1932.

HETTIE WHITAKER,
District Clerk, Irion County, Texas.

(Seal)

19 DEFENDANT'S ORIGINAL ANSWER.

Filed May 10, 1932.

In the District Court of the United States for The Northern District of Texas, San Angelo Division.

Mrs. Nannie May Williams, Plaintiff,
vs. No. 269 at Law.
The Union Central Life Insurance Company,
Defendant.

Now, by its attorneys, comes The Union Central Life Insurance Company, defendant in the above styled and numbered cause, and makes answer as follows to the Original Petition of the Plaintiff filed herein and to any amendment thereto that has been or hereafter may be filed.

1. It demurs to said petition, and says that the same is insufficient in law to require of it any further answer thereto.

2. It denies, all and singular, the allegations in said petition contained.

LOCKE, LOCKE, STROUD & RANDOLPH,
Attorneys for Defendant.

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20 PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION.

Filed October 20, 1932.

(Title Omitted.)

To the said Honorable Court:

Mrs. Nannie May Williams, Plaintiff, complaining of The Union Central Life Insurance Company, de-

fendant, under leave of Court, files this her first amended original petition in lieu of her original petition heretofore filed herein, and shows to the Court:

First:

That plaintiff resides in Irion County, Texas, and is the widow of P. H. Williams, deceased, the said P. H. Williams being designated in the policy hereinafter referred to under his full name, Peter Hardy Williams; that he died in Tom Green County, Texas, on October 15, 1931.

Second:

That defendant is a foreign life insurance company, a private corporation, duly incorporated under the laws of the State of Ohio, with its home office in the City of Cincinnati, in said State, and is now, and was, at all times herein mentioned, engaged in the business of writing and issuing policies of life insurance under the laws of and in the State of Texas as an old line (legal reserve) company with a permit to transact said business in the State of Texas. That said company has no local agent in Irion County, Texas; that it has a local agent in Tom Green County, Texas, same being Charles A. Poteet, who was local agent as aforesaid, at all times herein mentioned.

21 Third:

That heretofore, to-wit: On the 26th day of July, 1927, defendant issued its policy No. 940457, on the life of the said P. H. Williams, designated in said policy under his full name of Peter Hardy Williams, in and under which policy the said Company so issuing same agreed to pay to this plaintiff named as beneficiary therein, the sum of Ten Thousand Dollars

($10,000.00) payable on receipt of due proof of the death of said insured, less any indebtedness and advances on said policy. That the application for said policy was made to the said local agent of defendant in Tom Green County, Texas; and that said policy was delivered to the said P. H. Williams in Tom Green County, Texas, by said local agent. That on the date of the issuance of said policy, plaintiff was the legal wife of the said P. H. Williams and said marriage relation continued until it was terminated by his death as aforesaid. That said contract of insurance is what is known as a participating policy. That all premiums on said policy for and throughout the first four policy years, were duly and fully paid under and in accordance with the provisions and terms of said policy; that by virtue of the provisions of said policy relating to extended insurance, the law applicable thereto, and the facts hereinafter set forth, said policy was in full force and effect upon the date of the death of the said P. H. Williams, as an undertaking, contract and obligation of defendant, effective for, and inuring to, the benefit of plaintiff.

Fourth:

That on or about November 4th, 1931, plaintiff by her attorney, Chas. Gibbs, formally notified defendant of the death of the said P. H. Williams, and requested that defendant send her proper forms for making proof of death under said policy. That on or about November 12, 1931, defendant notified plaintiff,
22 through a communication to said attorney, that it did not recognize any liability under such policy; that proof of death would not be required; that said policy was not in force at the date of the death of the said P. H. Williams.

Plaintiff shows to the Court that said policy does not stipulate how due proof of death therein referred to should be made, or on what form same should be submitted; and she accordingly, on said date of November 4, 1931, requested the defendant to furnish proper form for said purpose. That she was able, ready and willing to furnish to defendant proof of the death of the said P. H. Williams on any form defendant might elect to have used for said purpose but that after defendant so notified her of its contention that said policy was not in force at the date of the death of the said P. H. Williams, it would have been an idle ceremony for her to make out and send in any proof of any kind, and such precedure could have served no purpose whatsoever; and, accordingly, plaintiff did not submit any proof of death on any company form.

In this connection, she shows to the Court that defendant did not, at that time, contend and has never contended that there was any question about the death of the said P. H. Williams. On the contrary, defendant had actual notice of his death within 24 hours thereafter, and has predicated its denial of liability to this plaintiff as beneficiary under said policy, solely on the contention that the policy was not in force at the time of the death of Mr. Williams, contending that it lapsed without value for failure to pay the fifth annual premium due June 10, 1931, and that at the time of lapse, the outstanding indebtedness by way of policy advance and interest exhausted all equity.

That said communication dated November 4, 1931, from her said attorney to said defendant was not only a request for death forms as aforesaid, but
23 was also, and was so intended by her and so construed by defendant, as a demand for the payment to her of all amounts lawfully accrued to her as beneficiary aforesaid, that is, the face amount of

said policy, to-wit: the sum of Ten Thousand Dollars ($10,000.00) less all lawful and valid indebtedness and advances thereon.

Fifth:

Said policy contained the following relevant provisions:

"A grace of thirty-one days shall be granted for the payment of any premium after the first."

"After two full years' premiums have been paid, on failure to pay any subsequent premium, this policy shall lapse and its value, if any, shall be applied as set forth in article sixteen."

Article 16 is as follows:

"16. Policy Values. The surrender value may be used at the option of the owner of the policy in any one of the following ways, all of equal value, as set forth in the following tables, provided there be no indebtedness or advances on the policy. If, on failure to pay a premium, no option is exercised, such value shall be applied as provided in Option I."

Article 17, setting forth Option 1, is as follows:

"17. Option 1—Extended Insurance. Applied to the extension of this policy as participating term insurance from the date to which premiums have been paid, without any further payment (Table 1.) The value of any paid-up additions will be used to increase the term of extension. Accumulations of dividends at interest may be applied to increase the term of ex-
24 tension. Dividends on extended insurance shall be paid in cash and only for completed policy years."

Articles 22 and 23 are as follows:

"22. Deduction of Indebtedness. If there be any indebtedness or advances on this policy, the cash value

shall be reduced thereby; the paid-up value shall be reduced proportionately; and the extended insurance shall be for the face value of the policy less the indebtedness and advances and for such term as said reduced cash value will provide."

"23. Tables of Values. The values in these tables are on the basis of $1,000.00 of insurance, assuming all premiums to have been paid when due. If this policy is for insurance of more or less than $1,000.00, the paid-up insurance, loan and cash values are increased or reduced proportionately. The term of extended insurance does not vary with the amount of insurance. The surrender charge has been deducted. Values for the years not stated will be furnished on application.

Age 51.—Ordinary Life.

1. Extended Insurance for each $1000 of the sum insured. 2. Paid up Insurance. 3. Loan or 4. Cash.

End of Year					End of Year
2	1 year	250 days	$49	$27	2
3	3 years	165 days	107	59	3
4	4 years	330 days	160	91	4

25 Articles 10, 11 and 12 are as follows:

"10. Dividends. This policy shall participate in profits, as apportioned by the Directors. Beginning at the end of the first policy year, provided the second year's premium is paid, dividends shall be declared annually during its continuance."

"11. Dividend Options. Dividends may be withdrawn in cash; or applied to the payment of premiums;

or left to accumulate with interest at three and one-half per cent increased from surplus interest earnings as apportioned by the Directors, until the maturity of the policy, subject to withdrawal at any time; or applied to the purchase of paid-up participating additions to the policy, convertible into cash at any time for the amount of the original dividends or the reserve of the additions, if larger, but payment may be deferred by the Company ninety days from the date of the application therefor."

"12. Automatic Disposition. On payment of the premium, or on the policy anniversary if no further premium is payable, if no other option has been elected, the dividend then due shall be applied to the purchase of paid-up additions. In the event of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected, or if the policy shall lapse, the dividend then due shall be paid in cash. At the death of the insured during the continuance of the policy, the pro rata part of the dividend for the current policy year shall be paid in cash."

26 Sixth.

That on or about and under date of June 10, 1930, the said insured, P. H. Williams, executed under and in accordance with the provisions of said policy, a policy loan note as follows:

"This advance may be paid in full or in part at any time, $858.00.

Cincinnati, Ohio, June 10, 1930.

In consideration of an advance of Eight Hundred Fifty Eight & 00/100 Dollars by The Union Central Life Insurance Company, of Cincinnati, Ohio, the re-

ceipt of which is hereby acknowledged, I hereby assign to and deposit with said Company as sole security for said advance and interest its Policy No. 940457 on the life of Peter H. Williams, together with the paidup additions thereto, if any, and

I hereby agree with said Company: 1. To pay interest on said advance at the rate of six per centum per annum, payable annually at the Home Office of said Company in Cincinnati, Ohio.

2. On Default in payment of any premium on said policy, the policy shall lapse and this advance, with accrued interest and any other indebtedness on said policy, shall be deducted from the surrender value of the policy (which if not otherwise stated therein, shall be the reserve value of the extended insurance provided therein, on the valuation reserve basis of the policy) and the balance, if any, of such surrender value shall bt applied as provided in the policy (or, if there is no such policy provision, in accordance with the Company's rules.)

3. If the interest on this advance is not paid when due, no default having been made in payment of premium, such interest shall become a part of the principal and bear interest in the same manner, and if the total indebtedness and advances on the policy shall equal or exceed the then loan value said policy shall thereupon become null and void, and shall be deemed to be surrendered in consideration of the cancellation of said advance, and any indebtedness on said policy; provided, however, that failure to repay said advance or to pay interest shall not avoid the policy unless the total indebtedness and advances thereon shall equal or exceed such loan value at the time of such failure and until thirty-one days after notice shall have been mailed to the insured and assignee, if

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any, during which time the payment of any indebtedness and advances will be accepted.

4. The amount of this advance and accrued interest shall be deducted from any amount payable under the said policy.

5. Any notes given from premiums, with interest, shall be deducted from this advance.

6. The company is hereby requested to draw the check or draft issued in connection with this advance to the order of .....

7. For the purpose of obtaining this advance, I hereby declare that I have made no assignment of said policy, and that no petition that I be adjudged a bankrupt has ever been filed by or against me.

P. O. Address:
Street and No. 236 W. Bugard—Peter H. Williams, Insured
Town San Angelo ..... Beneficiary
County and State Tom Green Co. Tex ..... Assignee."

28 Defendant never did invoke the clause numbered 3 thereof and never did send to the said insured the notice therein provided for. On June 10, 1931, the fifth annual premium of Four Hundred Forty-nine and 10/100 Dollars ($449.10) was due on said policy. The insured was financially unable to pay same on said date or within the thirty-one days of grace provided for in the policy. The fact that he was financially unable to so pay same was well known to the defendant. Dividends were declared and accrued to said policy on June 10, 1931, in the amount of Seventy-four and 80/100 Dollars ($74.80). Divi-

dends had also been declared on and had accrued to said policy at the end of each of the preceding policy years and had in each of said instances, been applied to the purchase of insurance by way of reduction of annual premium and the said insured had by the course of dealing with said company long prior to June 10, 1931, permanently elected that all dividends accruing to said policy should be used for the purpose of keeping said policy in force in the way most beneficial to himself which election was well-known to defendant and by its said course of dealing, defendant had long prior to June 10, 1931, agreed that dividends accruing to said policy should be so used.

That at the end of the days of grace provided for in said policy for the payment of the fifth annual premium, the said loan against said policy, including all interest, amounted to Nine Hundred Fourteen and 03/100 Dollars ($914.03). On failure to pay the fifth annual premium as aforesaid, no option under the nonforfeiture benefits or clauses of the policy was exercised by the insured, and accordingly, under the terms and provisions of said policy, the value of same was automatically applied to the purchase of extended insurance.

29 In this connection, plaintiff shows and alleges that under the course of dealing between the said insurer and the insured, and under the terms of said policy, the said dividend of Seventy-four and 80/100 Dollars ($74.80) constituted a part of the gross policy value; said value including said dividend and the tabular four year surrender value of Nine Hundred and Ten Dollars ($910) aggregating Nine Hundred Eighty-four and 80/100 Dollars ($984.80) the difference between which and the said total indebtedness of Nine Hundred Fourteen and 03/100 Dollars ($914.03) was, at the end of the days of grace, Seventy and

77/100 dollars ($70.77) said last named sum being the net value as fixed by Article 22 of the policy as a net single premium for the purchase of extended insurance, the amount of said extended insurance being for the said face value of the policy, to-wit: the sum of Ten Thousand Dollars ($10,000) less said indebtedness, Nine Hundred Fourteen and 03/100 Dollars ($914.03), and the period or term of said extended insurance being 139 days from June 10, 1931. The period from June 10, 1931, to October 15, 1931, the date of the insured's death, comprises 127 days; hence, on the date of the death of the said insured, said policy was in full force and effect as aforesaid, in the reduced amount of Nine Thousand, Eighty-five and 97/100 Dollars ($9,085.97), as an obligation of defendant effective for and inuring the benefit of the plaintiff.

Seventh.

Said policy of insurance having been delivered in the State of Texas as aforesaid, the non-forfeiture provisions of the insurance laws of said State became a part thereof. Section 7 of Article 4732, Revised Civil Statutes of the State of Texas, in force on the date of the delivery of said policy and on the date of the application therefor, provides in effect that in the event of default in the payment of premiums after premiums shall have been paid for three full years, any dividends at that time accrued and payable on the policy shall be added to the policy values; that is to say, the tabular surrender value provided for in the policy shall be augmented by the amount of any such dividend. By virtue of said statute, irrespective of any of the provisions of said policy relating to dividends, such dividends on the date of default at the end of the period of grace, automatically and by operation of said statute, were added to the said fourth year surrender value of Nine Hun-

dred Ten and no/100 Dollars ($910.00) provided for in said policy, and the difference between said total policy value and the said indebtedness in accordance with the provisions of said policy and the calculations set forth in the next preceding subdivision of this petition, operated to extend said insurance in the amount of Nine Thousand, Eighty-five and 97/100 Dollars ($9,085.97) for a period of 139 days from June 10, 1931.

Plaintiff further shows to the Court that on or about June 10, 1931, defendant sent to the said insured, P. H. Williams, the following communication:

"The Union Central Life Insurance Company Home Office, Cincinnati, Ohio.

You are hereby notified that a premium as described below will become due and be payable subject to the conditions of this office.

Premium and Dividend Statement.

Amount of premium	$449.10
Dividend	74.80
Reduction Amount Due	$374.30

Amount of Premium $449.10.
Policy Number 940457-A.
How Payable .....
Date Mo. Due 10th June, 1931.

PETER H. WILLIAMS,
Central Hotel San Angelo
Texas.

Please make payment before that date to the Union Central Life Ins. Co. 1127-28 Athletic Club Bldg., Dallas, Texas.

31 Checks and Money orders should be made payable to The Union Central Life Insurance Company.

Return this notice and receipt will be sent you.

(Over.)

Unless said premium shall be paid to the Company, or a duly appointed Agent or person authorized to collect the same on or before the day it falls due, your policy and all payments thereon will become forfeited and void except as to values provided for therein.

To conform with the laws of certain states the above notice is given, but a cash payment of the premium without interest will be accepted at any time within thirty-one days from its due date.

Agents are not authorized to countersign receipts, unless signed by some officer of the Company, to grant permits, make or alter contracts, waive forfeitures, or make any alterations of a renewal receipt.

If the address on the face of this notice is not correct please indicate by writing "Over" on the face thereof, and give the correct address in the space below.

W. HOWARD COX,
Secretary.

No ..... Street ..... Town .....
County ..... State .....

That by said communication, defendant agreed that said dividend of $74.80 constituted a payment on the said policy and recognized it as such; and further agreed that if the balance of $374.30, designated as the amount due in said notice should not be paid within

the thirty-one days of grace from June 10, 1931, the said payment of $74.80 would constitute a part of the values provided for in the policy; and the insured not having otherwise elected, a part of the values operating to purchase extended insurance. And by
32 said notice, defendant recognized that the said insured had elected that the said dividend should not be paid in cash. In other words, the import of said communication was that if the insured did not pay the sum of $374.30 within the 31 days of grace provided for in said policy, then the said sum of $74.80 would be added to the fourth year tabular surrender value, of $910.00, making the total policy, value $984.80 and after deducting all of the said indebtedness, leaving a net value of $70.77 operating to extend the policy for a period of 139 days from June 10, 1931, in the amount of $9085.97 as outlined in the sixth subdivision of this petition hereinabove, the result being that said policy was in full force and effect in the amount of $9,085.97 on October 15, 1931, the date of the death of the said P. H. Williams.

Ninth.

Pleading in the alternative to each and all of the foregoing pleas, plaintiff shows to the Court that by virtue of the transaction on June 10, 1930, evidenced by the policy loan note hereinabove set forth, defendant became pledgee of said policy; and therein and thereby, the defendant impliedly agreed to use all reasonable means consonant with the terms of said obligation to preserve said security. Said policy loan note contains the following provision: "This advance may be paid in full or in part at any time."

On June 10, 1931, and throughout the 31 days of grace thereafter, defendant had in its possession the said 1931 dividend and had in its possession said policy

and said policy loan note. Said 1931 dividend so accruing on said policy while defendant held said policy as a pledge to secure said note became and constituted a payment on said policy loan indebtedness, reducing said indebtedness by the amount of $74.80
33 on said date; that is, at the expiration of said days of grace. The loan, including all interest to that date, amounted to the sum of $914.03. The application of said dividend of $74.80 on said indebtedness left a net amount owing of $839.23. The difference between the tabular fourth year surrender value and said sum of $839.23 is the sum of $70.77, representing or constituting the net policy value applicable to purchase extended insurance and operating under the terms of said policy to continue said policy in force and effect in the amount of $9,085.97 for a period of 139 days from June 10, 1931. The said P. H. Williams did not elect or seek any nonforfeiture option other than extended insurance and said insurance resulted from the existence of said net policy value and the operation of clauses 17 and 22 of the policy and said policy was in full force in said reduced amount at the date of the death of the said P. H. Williams, to-wit: On October 15, 1931, as an obligation of defendant effective for and inuring to the benefit of plaintiff.

Tenth.

In connection with and as a part of each of the foregoing subdivisions hereof, numbered six to nine inclusive, plaintiff shows to the Court that at all times since June 10, 1930, defendant has had possession of said policy of insurance. The defendant did not, on June 10, 1931, or at any time within the 31 days of grace, thereafter, or at any subsequent time, pay or offer to pay to the said P. H. Williams, the amount of said 1931 dividends in cash and the insured did not request or seek payment of the same in cash. On the

34 contrary, he directed that same be used to purchase insurance in the most practicable way—which was to increase the policy value, as defendant well knew; and had elected not to take said dividend in cash, as defendant well knew. That by virtue of said state of facts, the provisions of said policy, the terms of said loan note, and the relations existing between the said insurer and the said P. H. Williams said 1931 dividend, when default was made in the payment of the 1931 annual premium, automatically and by operation of law, either augmented the tabular surrender value of the policy or diminished the loan by the amount of said dividend, with the result in either case that said policy was in force in the reduced amount as aforesaid on the date of the death of the said P. H. Williams.

Eleventh.

The allegations hereinbefore made as to the term and period of extended insurance are predicated upon the assumption that the amount set forth in the policy table as the fourth year surrender value is the true amount of the fourth year surrender value per $1000.00 of insurance, exclusive of the 1931 dividend.

Plaintiff shows to the Court that without reference to the question of the application of the 1931 dividends and exclusive of same, said policy in fact provides for a greater fourth year surrender value than that set forth in said table. In this connection, plaintiff alleges that said policy contains the following pertinent provisions, same being:

14. Reserve Basis. The reserve of this policy is computed on the American Experience Table of Mortality with interest 3½%.

"15. Surrender Value. After two full years' premiums have been paid, the surrender value for each thousand dollars of insurance is equal to the reserve at the end of the policy year, omitting cents, except that in the second, third and fourth policy years it is equal to the reserve at the end of the policy year, taken to the nearest dollar, less surrender charges of $21, $13 and $6 respectively."

Plaintiff further alleges that the amount of the fourth year surrender value set forth in said table is predicated upon a reserve based upon a premium rate of $36.59 per thousand dollars insurance, whereas, the premium provided for in said policy is at the rate of $44.91 per thousand dollars of insurance; that without including the 1931 dividend, the fourth year reserve computed according to the American Experience Table of Mortality, with interest at 3½% after allowing the surrender charge provided for in said policy, exceeded all indebtedness on said policy by a sum more than sufficient to provide for extended insurance under the terms of the policy relating thereto, for a period beyond October 15, 1931, and by virtue of said provisions of said policy and the premium charged by the insurer and paid by the insured, said policy was in full force and effect in the reduced amount of $9,085.97 on October 15, 1931, the date of the death of the said P. H. Williams.

Twelfth.

Plaintiff further alleges that on account of the said denial of liability by defendant and its refusal to recognize her rights as beneficiary under said policy and its contention that said policy lapsed without value upon the expiration of the 31 days of grace after June 10, 1931, it became necessary for her to employ the attorneys whose names are signed hereto, to institute

this litigation; that she is under and by virtue of the provisions of Article 4736, Revised Civil Statutes of the State of Texas, 1925, as amended by the
36 Acts of 1931, 42nd Legislature, page 135, Chapter 91, Section 1, entitled to recover of the defendant a reasonable attorney's fee; that in view of all the foregoing facts and circumstances and in view of all the benefits to plaintiff incident to the prosecution of this suit accrued and to accrue on account of such policy, the sum of Three Thousand, Five Hundred and No/100 Dollars ($3,500.00) is a reasonable attorney's fee for the prosecution and collection of such loss; that plaintiff is further entitled under and by virtue of the provisions of said statute to recover twelve per cent (12%) as damages on the amount of such loss, such loss being in the amount of Nine Thousand, Eighty-five and 97/100 Dollars ($9,085.97) and said 12% damages being in the amount of One Thousand, Ninety and 31/100 Dollars ($1,090.31), all of said amounts aggregating the sum of Thirteen Thousand, Six Hundred Seventy-six and 28/100 Dollars ($13,676.28). That on said amount of $9,085.97, plaintiff is further entitled to interest at the rate of six per cent (6%) per annum from November 12, 1931.

Wherefore, defendant having already been cited to appear and having answered herein, plaintiff prays that on hearing hereof, she have judgment against defendant for the said sum of Thirteen Thousand, Six Hundred Seventy-six and 28/100 Dollars ($13,676.28) together with interest as aforesaid, and for costs of suit.

CHAS. GIBBS,
McGOWN & McGOWN,
ANDERSON, ORR & McCORD,
J. W. STOVALL,
H. O. WILLIAMS,
Attorneys for Plaintiff.

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER.

37 Filed October 20, 1932.

(Title Omitted.)

To the said Honorable Court:

Now, by its attorneys, comes The Union Central Life Insurance Company, defendant in the above styled and numbered cause, and under leave of Court files this its first amended original answer in lieu of its original answer heretofore filed. So amending, the defendant answers as follows to the first amended original petition of the plaintiff and to any subsequent amendment thereof that has been or that hereafter may be filed.

1. The defendant excepts to the said petition and says that the same is insufficient in law to require of it any further answer thereto.

2. The defendant specially excepts to the said petition and that portion thereof wherein the plaintiff invokes Article 4736 of the Revised Statutes of Texas, as amended by the Acts of 1931, 42d legislature, ch. 81, for that such statute is unconstitutional, particularly as applied to the circumstances of this case, as exhibited in the pleadings, from which pleadings it appears that there has been no vexatious refusal on the part of the defendant to pay the plaintiff, and that the defendants' failure to pay is due solely to an honest and fair difference of opinion between it and the plaintiff as to the defendant's liability, the defendant being entitled to have such issue litigated the same as any other person within the jurisdiction of the United States and to set up its defenses in such litigation, and for that such

statute as amended violates Amendment 14,
38 Sec. 1, of the constitution of the United States in that it deprives the defendant of its property without due process of law and denies the defendant the equal protection of the laws.

3. The defendant denies each and every allegation contained in such petition.

4. Under date of June 4, 1927, Peter Hardy Williams made and executed a written application to the defendant for $25,000 of ordinary life insurance on his life, as subsequently amended, in one policy of $10,000 and one policy for $15,000, and stipulated in such written application that the premiums should be payable annually, that the payment of the first premium on each policy should keep the insurance in force only to the date fixed in the policy for payment of the next premium. Under date of July 26, 1928, pursuant to such written application, the defendant issued to the said Peter Hardy Williams, among other policies, its policy of insurance number 940,457, in which, by express stipulation, as hereinafter set forth, the said application was made a part of the contract of insurance. By such policy in consideration of a premium payment of $449.10; and of the payment of a like amount annually on the 10th day of June in every year during the lifetime of the said Peter Hardy Williams, the defendant insured the life of the said Peter Hardy Williams in the amount of $10,000, which sum, less any indebtedness and advances on the policy, and any unpaid portion of the premium for the current policy year, the defendant promised to pay at its home office in Cincinnati, Ohio, to the plaintiff, on receipt of due proof of the death of the insured during the continuance of the policy. Such promise of the defendant was subject to the conditions and provisions, specified on certain pages of the policy after the first page or the

face of the policy, which conditions and provisions, by clauses appearing on the face of the policy, were made a part of the contract between the insured and the defendant.

39 5. Among the said conditions and provisions are the following:

"Premiums and Dividends."

8. Payment of premiums. All premiums shall be payable in advance, either at the Home Office, or to an authorized agent of the Company on delivery of a receipt signed by the President or Secretary and countersigned by such agent.

Failure to pay any of the first two years' premiums, or instalment thereof, shall avoid and nullify this contract.

After two full years' premiums have been paid, on failure to pay any subsequent premium, this policy shall lapse and its value, if any, shall be applied as set forth in article sixteen.

The note of the insured or the beneficiary, or their assigns, shall be accepted in payment of the second or subsequent year's premium, or part thereof, if the surrender value of the policy shall equal or exceed such note and any other indebtedness on the policy. Any note accepted in payment of a premium shall be a first lien on the policy and a set-off in the calculation of policy values.

9. Grace. A grace of thirty-one days shall be granted for the payment of any premium after the first. In event of the death of the insured during the days of grace the insurance shall be deemed to be in

force, and any unpaid premium for the current policy year shall be deducted from the sum payable.

40 10. Dividends. This policy shall participate in profits, as apportioned by the Directors. Beginning at the end of the first policy year, provided the second year's premium is paid, dividends shall be declared annually during its continuance.

11. Dividend Options. Dividends may be withdrawn in cash; or applied to the payment of premiums; or left to accumulate with interest at three and one-half per cent, increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy, subject to withdrawal at any time; or applied to the purchase of paid-up participating additions to the policy, convertible into cash at any time for the amount of the original dividends or the reserve of the additions, if larger, but payment may be deferred by the Company ninety days from the date of application therefor.

12. Automatic Disposition. On payment of the premium, or at the policy anniversary if no further premium is payable, if no other option has been elected, the dividend then due shall be applied to the purchase of paid-up additions. In the event of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected, or if the policy shall lapse, the dividend then due shall be paid in cash. At the death of the insured during the continuance of the policy, the pro rata part of the dividend for the current policy year shall be paid in cash.

"Policy Values."

14. Reserve Basis. The reserve of this policy is computed on the American Experience Table of Mortality with interest 3½%.

41 15. Surrender Value. After two full years' premiums have been paid, the surrender value for each thousand dollars of insurance is equal to the reserve at the end of the policy year, omitting cents, except that in the second, third and fourth policy years it is equal to the reserve at the end of the policy year, taken to the nearest dollar, less surrender charges of $21, $13, and $6 respectively.

16. Policy Values. The surrender value may be used at the option of the owner of the policy in any one of the following ways, all of equal value, as set forth in the following tables, provided there be no indebtedness or advances on the policy. If, on failure to pay a premium, no option is exercised, such value shall be applied as provided in Option I.

17. Option 1—Extended Insurance. Applied to the extension of this policy as participating term insurance from the date to which premiums have been paid, without any further payment (Table 1). The value of any paid-up additions will be used to increase the term of extension. Accumulations of dividends at interest may be applied to increase the term of extension. Dividends on extended insurance shall be paid in cash and only for completed policy years.

18. Option 2—Paid-up Insurance. Applied to the purchase of paid-up participating insurance, on written request and the surrender of the policy before the expiration of the days of grace (Table 2). Any paid-up additions will be added to the amount of the paid-up insurance. Accumulations of dividends at interest may be applied to purchase additional paid-up in-
42 surance provided the total amount of paid-up insurance shall not exceed the face amount of the policy. Dividends on paid-up insurance shall be paid in cash.

19. Option 3—Loan. Borrowed or taken in advance in whole or in part on the sole security of the policy, on assignment thereof, less the unpaid balance of the current year's premium and any indebtedness and previous advance on this policy, at six per cent interest payable annually on the anniversary of the policy, interest to be discounted and paid in advance (Table 3).

Failure to repay any such advance or to pay interest shall avoid this policy whenever but not until the total indebtedness and advances hereon with interest shall equal or exceed the then loan value and not until one month after notice shall have been mailed by the Company to the last known address of the insured, and of the assignee, if any.

The loan value will be increased by the value of any paid-up additions.

The loan value, less interest to next anniversary, is available at any time during the policy year if premiums have been paid to the end of the year.

20. Option 4—Cash. Collected in cash on written surrender of the policy before the expiration of the days of grace (Table 4). The cash value will be increased by the value of any paid up additions. Payment may be deferred to the Company ninety days from the date of application therefor.

21. Credit for fractional premiums. If default shall occur at any time other than the end of the policy year the values for the preceding policy year shall be proportionately increased for the portion of the policy year for which premiums have been paid.

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22. Deduction of Indebtedness. If there be any indebtedness or advances on this policy, the cash value shall be reduced thereby; the paid-up value shall be reduced proportionately; and the extended insurance shall be for the face value of the policy less the indebtedness and advances and for such term as said reduced cash value will provide.

23. Tables of Values. The values in these tables are on the basis of $1,000 of insurance, assuming all premiums to have been paid when due. If this policy is for insurance of more or less than $1,000, the paid-up insurance, loan and cash values are increased or reduced proportionately. The term of extended insurance does not vary with the amount of insurance. The surrender charge has been deducted. Values for the years not stated will be furnished on application.

Age 51. Ordinary Life.

End of Year.	1. Extended Insurance.	2. Paid up Insurance. for each $1000 of the sum insured.	3. Loan or 4. Cash.	End of Year.
2	1 year, 250 days	$ 49	$ 27	2
3	3 years, 165 days	107	59	3
4	4 years, 330 days	160	91	4
5	6 years, 25 days	210	121	5
6	6 years, 284 days	248	146	6
7	7 years, 132 days	285	172	7
8	7 years, 304 days	321	197	8
9	8 years, 75 days	356	223	9
10	8 years, 179 days	389	248	10
11	8 years, 258 days	421	274	11
12	8 years, 313 days	452	300	12
13	8 years, 348 days	481	325	13
14	9 years, 3 days	509	350	14
15	9 years, 11 days	536	376	15

16	9 years, 6 days	562	400	16
17	8 years, 357 days	587	425	17
18	8 years, 335 days	611	449	18
19	8 years, 304 days	633	473	19
20	8 years, 265 days	654	496	20
25	7 years, 311 days	747	605	25
30	6 years, 201 days	823	707	30

44 "General Privileges and Conditions."

24. Contract. This policy, together with the application, a copy of which is indorsed hereon, or securely attached hereto, shall constitute and contain the entire contract. All statements shall, in the absence of fraud, be deemed representations and not warranties. No such statement shall avoid this policy or be used in defense to a claim thereunder, unless it is contained in the written application, and unless a copy of such application is indorsed on or attached to the policy when issued.

25. Change of Beneficiary. Unless it is stated on the first page hereof that the policy is without privilege of change of beneficiary, the insured, without the consent of any beneficiary, may exercise every
45 right and receive every benefit reserved to the insured, or the owner of the policy, or agree with the Company to any change in or amendment to the policy, and shall have the right at any time to change the beneficiary, by written notice to the Company at the Home Office, for which a form will be furnished on request.

28. Incontestability. This policy shall be incontestable after two years from the date of issue, except for nonpayment of premium or for violation of the provisions of this policy, if any, relating to military and naval service in time of war.

31. Authority. None of the terms of this policy shall be modified, nor any forfeiture under it waived, save by an agreement in writing, signed by the President, a Vice-President, the Secretary or an Assistant Secretary, whose authority for this purpose shall not be delegated."

6. Thereby, in effect, it was provided that all premiums should be payable in advance either at the Home Office of the defendant in Cincinnati, Ohio, or to an authorized agent of the defendant on delivery of a receipt signed by the President or Secretary and countersigned by such agent; that the note of the insured or beneficiary or their assigns should be accepted in payment of the second or subsequent years' premiums or part thereof if the surrender value of the policy should equal or exceed such note and any other indebtedness on the policy, and that any note accepted in payment of the premiums should be a first lien on the policy and a set-off in the calculation of policy values. It was further provided that the reserve of the policy should be computed on the American Experience Table of Mortality with interest at three and one-half percentum, and that, after two full years' premiums should be paid, the surrender value for each
46 $1,000.00 of insurance would be equal to the reserve at the end of the policy year, omitting cents, except that in the second, third and fourth policy years it would be equal to the reserve at the end of the policy year, taken to the nearest dollar, less surrender charges of $21, $13 and $6 respectively. It was further provided that failure to pay any of the first two years' premiums, or instalment thereof, should avoid and nullify the contract of insurance, and that, after two full years' premiums should be paid, on failure to pay any subsequent premium, the policy should lapse, and its value, if any, should be applied as set forth in article sixteen of said conditions and provisions, namely, that.

after two full years' premiums should be paid, the surrender value of the policy might be used, at the option of the owner of the policy, in any one of four certain ways, all of equal value, as set forth in the tables specified in said policy and hereinabove copied, provided there should be no indebtedness or advances on the policy, and that, if on failure to pay a premium no option should be exercised by the owner of such policy, such value should be applied as provided in option one, namely, to the extension of the policy as participating term insurance from the date to which the premiums should be paid, without any further payment. With respect to the said first way, it was further provided that the value of any paid-up additions would be used to increase the term of extension, that accumulations of dividends at interest might be applied to increase the term of extension, and that dividends on extended insurance should be paid in cash and only for completed policy years. The second way in which, at the option of the owner of the policy, the surrender value might be applied, was to the purchase of paidup participating insurance, or written request and the surrender of the policy before the expiration of
47 the days of grace, the amounts of such participating insurance purchasable with such surrender value, being as specified in Table Two of the said Table of Values set forth in said policy and hereinabove copied. With respect to the second way, it was further provided that any paid-up additions would be added to the amount of the paid-up insurance, and that accumulation of dividends at interest might be applied to purchase additional paid-up insurance provided the total amount of the paid-up insurance should not exceed the face amount of the policy, and that dividends on paid-up insurance should be paid in cash. The third way in which at the option of the owner of the policy such surrender value might be applied was the borrowing or taking in advance the surrender value

in whole or in part, on the sole security of the policy, on the assignment of the policy less the unpaid balance of the current year's premium and any indebtedness and any previous advance on the policy at six per centum interest payable annually on the anniversary of the policy, such interest to be discounted and paid in advance; the amount of such surrender value at the end of each of the various years which might be thus borrowed or taken in advance being as specified in Table Three of the said Table of Values set forth in said policy and hereinbefore copied. With respect to such third way, it was further provided that failure to repay any such advance or to pay interest should avoid the policy whenever, but not until, the total indebtedness and advances thereon with interest should equal or exceed the then loan value, and not until one month after notice should have been mailed by the defendant to the last known address of the insured, and of the assignee, if any; that the loan value would be increased by the value of any paid-up additions; that the loan value less interest to the next anniversary of the policy would be available at any time during the
48 policy year if premiums should have been paid to the end of the year. The fourth way in which at the option of the owner of the policy the said surrender value might be applied was the collecting of said surrender value in cash on the written surrender of the policy before the expiration of the days of grace; the amount of such surrender value at the end of each of the various years so collectible in cash on the written surrender of the policy being as specified in Table Four of the said Table of Values set forth in the policy and hereinabove copied. But it was provided, with reference to the lapse of the policy for failure to pay any premiums after two full years' premuims should have been paid and the application of the surrender value of the policy as aforesaid, that if there should be any indebtedness or advances on the said policy, the cash

value, that is to say the surrender value collectible in cash or applicable in any of the four ways specified as aforesaid, should be reduced thereby, that the paid-up value should be reduced proportionately, and that the extended insurance should be for the full face of the policy less the indebtedness and advances, and for such term only as the said reduced cash value would provide.

7. Further, in and by the said conditions and provisions, it was provided, in effect, that a grace of thirty-one days would be granted for the payment of any premium after the first, and that, in the event of the death of the insured during the days of grace, the insurance should be deemed to be in force, and any unpaid premiums for the current policy year should be deducted from the sum payable; that the policy should participate in profits, as apportioned by the directors of the defendant; that, beginning at the end of the first policy year, provided the second year's premium should be paid, dividends should be declared annually during the continuance of the policy; that, as dividend options available under said policy, such dividends might be withdrawn in cash or applied to the payment of premiums or left to accumulate with interest at three and one-half per centum, increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy, though subject to withdrawal at any time, or might be applied to the purchase of paid-up participating additions to the policy, convertible into cash at any time for the amount of the original dividends or the reserve of the additions, if larger, though payment might be deferred by the Company ninety days from the date of application therefor; that, as an automatic disposition of the dividend, in the absence of the election of any option, on payment of the premium or the policy anniversary, if no further premium should be payable, the dividend then due should be applied to the purchase of paid-up

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additions; but that, (1) in the event of the death of the insured during the days of grace, the current premium being unpaid, in the absence of the election of any other option, or (2) in the event of the lapse of the policy, the dividend then due should be paid in cash, and that, at the death of the insured during the continuance of the policy, the prorata part of the dividend for the current policy year should be paid in cash. It was further provided that the said policy, together with the application, a copy of which was indorsed on the policy or securely attached thereto, should constitute and contain the entire contract; that all statements should in the absence of fraud be deemed representations and not warranties; that no such statement should avoid the policy or be used in defense to a claim thereunder unless it was contained in the written application and unless a copy of such application was indorsed on or attached to the policy when issued; that the insured, the said Peter Hardy Williams, without consent of any beneficiary, might exercise every right and receive every benefit reserved to the insured, or the owner of the policy, and agree with the defendant to any change in or amendment to the policy, and should have the right at any time to change the beneficiary by written notice to the defendant at its Home Office, for which a form would be furnished on request. It was further provided that the policy should be incontestible after two years from date of issue, except for nonpayment of premium or for violation of the provisions of the policy, if any, relating to military and naval service in time of war, that none of the terms of the policy should be modified or any forfeiture under it waived save by an agreement in writing signed by the President, a Vice-President, the Secretary or an Assistant Secretary and that the authority of such officers for such purpose should not be delegated.

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8. On or about and under date of June 10, 1930, the defendant loaned and made an advance to said Peter Hardy Williams of $848.00 on the said policy, and the said Williams, in consideration of the same, executed and delivered to the defendant a written instrument in words and figures substantially as follows:

"$858.00 Cincinnati, Ohio, June 10, 1930.

In consideration of an advance of Eight Hundred Fifty Eight & 00/100 Dollars by The Union Central Life Insurance Company, of Cincinnati, Ohio, the receipt of which is hereby acknowledged, I hereby assign
to and deposit with said Company as sole
51 security for said advance and interest its
Policy Number 940,457 on the life of Peter H. Williams, together with the paid-up additions thereto, if any, and

I hereby agree with said Company: I. To pay interest on said advance at the rate of six per centum per annum, payable annually at the Home Office at said Company in Cincinnati, Ohio.

2. On default in payment of any premium on said policy, the policy shall lapse and this advance, with accrued interest and any other indebtedness on said policy, shall be deducted from the surrender value of the policy (which if not otherwise stated therein, shall be the reserve value of the extended insurance provided therein, on the valuation reserve basis of the policy) and the balance, if any, of such surrender value shall be applied as provided in the policy (or, if there is no such policy provision, in accordance with the company's rules).

3. If the interest on this advance is not paid when due, no default having been made in payment of pre-

mium, such interest shall become a part of the principal and bear interest in the same manner, and if the total indebtedness and advances on the policy shall equal or exceed the then loan value said policy shall thereupon become null and void, and shall be deemed to be surrendered in consideration of the cancellation of said advance, and any indebtedness on said policy; provided however, that failure to repay said advance or to pay interest shall not avoid the policy unless the total indebtedness and advances thereon shall equal or exceed such loan value at the time of such failure and until thirty-one days after notice shall have
52 been mailed to the insured and assignee, if any, during which time the payment of any indebtedness and advances will be accepted.

4. The amount of this advance and accrued interest shall be deducted from any amount payable under the said policy.

5. Any notes given from premiums, with interest, shall be deducted from this advance.

6. The said Company is hereby requested to draw the check or draft issued in connection with this advance to the order of.....

7. For the purpose of obtaining this advance, I hereby declare that I have made no assignment of said policy, and that no petition that I be adjudged a bankrupt has ever been filed by or against me.

PETER H. WILLIAMS,
Insured.

P. O. Address: ..... Street and No: 236 W. Bugard. Town: San Angelo. County and State: Tom Green Co., Tex."

On the back of which instrument was entered a credit of $10 as of the date of execution thereof, in order to make the net amount due on such instrument equal the exact amount advanced.

9. Thereby, in effect, the said Peter Hardy Williams, in consideration of the said advance of $848.00 by the defendant, acknowledged the receipt thereof and assigned to and deposited with the defendant as sole security for said advance and interest thereon the said policy of insurance, together with paid-up additions thereto, if any, and agreed with the defendant.

53 (1) To pay interest on said advance at the rate of six per centum per annum, payable annually at the Home Office of the defendant in Cincinnati, Ohio.

(2) On default in payment of any premium on said policy, the policy should lapse and said advance, with accrued interest and any other indebtedness on said policy should be deducted from the surrender value of the policy as determined in accordance with the terms of the policy, and the balance, if any, of such surrender value should be applied as provided in the policy, or, if there should be no such policy provision, in accordance with the defendant's rules;

(3) If the interest on the said advance should not be paid when due, no default having been made in the payment of any premium, such interest should become a part of the principal and bear interest in the same amount, and if the total indebtedness and advances on the policy should equal or exceed the then loan value said policy should thereupon become null and void and should be deemed to be surrendered in consideration of the cancellation of said advance and any indebtedness on said policy, provided, however, that failure to

repay said advance or to pay interest should not avoid the policy unless the total indebtedness and advances thereon should equal or exceed such loan value at the time of such failure and until thirty-one days after notice should have been mailed to the insured
54 and assignee, if any, during which time the payment of any indebtedness and advances would be accepted.

(4) The amount of said advance and accrued interest should be deducted from any amount payable under the said policy.

(5) Any notes given for premiums with interest should be deducted from said advance.

10. No payment was ever made by the said Williams or received by the defendant on account of either the principal of the said advance of $848.00, or the interest on the same, and on June 10, 1931, interest on such sum for one year at six per centum per annum matured, and default in the payment of the same was made. Premiums on said policy for each of the first four policy years were duly paid to the defendant, the dividends for such years declared by the defendant under said policy being applied by the option of the insured to the payment of premiums, the dividend in each year being applied to the payment of the premium for the succeeding year. There were no paid up additions or accumulations of dividends at interest. On June 10, 1931, an annual premium of $449.10 matured on said policy according to the terms thereof, and no payment was made by the said Williams or received by the defendant of the said premium on June 10, 1931, or within the thirty-one days of grace thereafter, and thereupon, with the expiration of the said days of grace, the said policy lapsed in accordance with its terms. The said date of June 10, 1931, was the end of the

fourth policy year. The surrender value of said policy at said time as specified in said policy, provided there had been no indebtedness or advances on said policy, might have been applied after deduction of
55 the indebtedness and advances on policy, at the option of the owner of said policy, under the terms of said policy, in any one of the four ways mentioned in paragraph six of this answer, or if no option was exercised by the owner of the policy,—and no option was exercised by the owner of the policy in the case at bar,—it was provided that such deduction should be applied to the extension of the policy as participating term insurance. The indebtedness and advances against the said policy, however, equaled or exceeded the surrender value of said policy and there was neither any sum available for application to the extension of the policy as participating term insurance, nor a sufficient sum to extend said policy to the date of the death of said Williams as alleged in plaintiff's petition.

11. There was declared by the defendant a dividend of $74.80, usable by the said Williams on June 10, 1931, according to the terms of said policy, but the said policy lapsed for non-payment of the said premium of June 10, 1931, as aforesaid, and was never of any further force or effect. Thereupon, according to the aforesaid provisions of the policy, the said dividend was payable in cash. The defendant promptly issued a check for such amount, payable to the order of the said Williams, but it subsequenty received from the said Williams a written instrument, dated September 18, 1931, made and executed by the said Williams, directing the payment of the dividend of $74.80 to Lee & Lee of Dallas, Texas, and in compliance with and in reliance on said order, the defendant paid the said sum to the said Lee & Lee, and such payment to the said Lee & Lee, being a payment to the said Williams' order,

56 constituted a payment in cash to the said Williams of the said dividend. The said dividend was never otherwise applied by either the said Peter Hardy Williams or the defendant.

12. Article 4736 of the revised Civil Statutes of Texas, as amended by the Acts of 1931, 42d Legislature, Chapter 81, invoked by the plaintiff with reference to attorney's fees and penalties, is unconstitutional, especially as applied to the circumstances of this case, wherein there has been no vexatious refusal on the part of the defendant to pay the plaintiff, and the defendant's failure to pay has been due solely to an honest and fair difference of opinion between it and the plaintiff as to the defendant's liability, the defendant being entitled the same as any other person within the jurisdiction of the United States to have such issue litigated and to set up its defense in such litigation. Such statute violates Amendment 14, Section 1, of the Constitution of the United States, in that it deprives the defendant of its property without due process of law, and denies the defendant the equal protection of the laws.

Wherefore, the said policy of insurance was not in force at the date of the death of the said Williams, and the defendant is under no liability to pay to the plaintiff in any capacity any sum of money on account of said policy.

And the defendant prays that it may be discharged hence without day, with its costs. It prays for such other and further relief as in the premises it may be justly entitled to.

RALPH RANDOLPH,
LOCKE, LOCKE, STROUD
& RANDOLPH,
Attorneys for Defendant.

"PLAINTIFF'S FIRST SUPPLEMENTAL PETITION."

57 Filed October 20, 1932.

(Title Omitted.)

To the said Honorable Court:

Now come Mrs. Nannie May Williams, Plaintiff, and files this her first supplemental petition in response to defendant's first amended original answer herein, and says:

I.

Plaintiff specially excepts to the following sentence in section or subdivision 11 of said first amended original answer, "The defendant promptly issued a check for such amount payable to the order of said Williams," for the reason that said allegation is not an allegation of any matter of fact that would constitute any defense or part of defense to plaintiff's cause of action; and for the further reason that nowhere in said answer is it alleged that said purported check was ever delivered or tendered to the said insured, P. H. Williams.

II.

Plaintiff denies all and singular the allegations contained in the following portions of said first amended original answer; the last sentence in section or subdivision 6; the first sentence in section or subdivision 10, insofar as same charges that no payment was ever made or received on account of the indebtedness against the policy; the last sentence in section or sub-

58 division 10; all of section or subdivision 11 following the phrase, "as aforesaid," in the fourth and fifth lines of said section, all of section 12.

Plaintiff also denies the allegation in section or subdivision 4 to the effect that said policy designated as beneficiary, the administrators, executors or assigns of the insured and shows to the Court that in said policy, this plaintiff in her individual capacity and as the wife of the said P. H. Williams, was designated as beneficiary.

III.

Plaintiff further shows to the Court that on September 18, 1931, the insured, P. H. Williams, was suffering from a serious disease of the liver, subsequently diagnosed as Cirrhosis; that he was suffering also from the effects of an accident which happened on or about August 16, 1931, on a farm in Irion County, Texas, when the said P. H. Williams was kicked down and trampled upon by a bull and was thereby injured internally; that from and after said date of August 16, 1931, the said P. H. Williams was physially and mentally incapacitated from engaging in any line of work or endeavor. That said physical condition and said mental condition continued from said date of August 16, 1931, to the date of his death, October 15, 1931. That on said date of September 18, 1931, he was in bed on his farm in Irion County, Texas, suffering from said malady and from the internal injuries sustained in said accident. That on September 17, 1931, all of his teeth were extracted and in the course of said operation, a local anaesthetic known as Novocaine, had been used, a drug which operates both upon the powers of physical feeling and mental perception.
59 That as a result of said operation, he suffered great pain and shock and did not rest or sleep the night of September 17, 1931, and on the following morning had fever and had fever throughout the day of September 18, 1931. That all of his teeth had been infected with pus and the extraction of said

teeth released the pus into the bloodstream and said poison operated upon his nervous system and brain with destructive force.

Plaintiff further shows to the Court that prior to the present financial depression which began about 1930, the said P. H. Williams had accumulated considerable wealth. That as said depression progressed, he became gradually involved in debt, a situation which caused him great worry and produced great mental strain. That on or about June 1, 1931, it became apparent to him for the first time, and he first realized, that he was financially involved to such an extent that it was likely he would lose everything he possessed and for the first time, he saw himself facing financial ruin. That said realization and said situation preyed upon his mind and tended to and did dull and impair his memory and reasoning power. That said worry as to his financial affairs, the internal injuries sustained on August 16, 1931, and said disease of Cirrhosis of the liver, united each as a direct and efficient cause thereof, to produce in the said P. H. Williams a condition of mental incapacity to engage in any contractual relations after the said date of August 16, 1931, and the extraction of his teeth as aforesaid on September 17, 1931, and the immediate consequences thereof, rendered said mental condition acute on said day of September 18, 1931. That on account of the combined effects of said financial worries, said malady and said injuries and said dental operation and of said drug, the said P. H. Williams was in a stupor and a daze when his signature was affixed on said date to the purported
60 written order referred to in defendant's pleading; and he did not have on said occasion, sufficient mind and memory to understand the nature and effect of said transaction and his mind at said time was so enfeebled by said malady, injuries, shock and said opiate or drug that he was unable to enter into con-

tractual relations and his situation as to his health, his physical condition and his state of mind was such that he did not and could not act with deliberation and such that he could not and did not act with any understanding of the transaction in question and his mental faculties were in such a state that he could not comprehend what he was doing and the force and effect of said purported order or of signing same.

In this connection, plaintiff shows to the Court that said instrument was not under seal and that same is and was a nullity on account of the mental incapacity of the said P. H. Williams as aforesaid, and same is ineffective to constitute any bar to plaintiff's cause of action.

IV.

Pleading in the alternative to the foregoing plea of legal mental incompetency, plaintiff shows to the Court that the signature of the said P. H. Williams was procured by fraud and that said instrument is void by virtue of fraud perpetrated upon the said P. H. Williams at the time of the execution thereof, said fraud being perpetrated in the following manner: That said instrument had been drawn and prepared with a clause at the top reciting that the insurance had lapsed; that it was well known to the person so procuring said signature, that said statement would create the impression and belief on the part of the said P. H. Williams that he no longer had any insurance and in this
61 connection, plaintiff alleges that the term, "lapsed", was used therein in its ordinary signification and not in the technical meaning given to it in insurance parlance; that is to say, that said term "lapsed" conveyed the impression that said insurance was no longer in force, had become extinguished and had slipped away into oblivion, prior to September 18, 1931, and defendant and its said agent well knew that

said recital would create an impression and belief upon the part of the said P. H. Williams in the condition in which he then was, if he had any understanding at all, that he had no longer any insurance to deal with and that the subject of insurance was not in the contemplation of the parties or in the scope of the terms of said instrument but that the only matter to be dealt with related to the disposition of a certain sum of money and plaintiff alleged that said recital, scheme and artifice did cause said impression and belief to be produced and did cause the said P. H. Williams to affix his signature to said instrument and said scheme was resorted to to effectuate said purpose and said instrument is at law, on account of said fraud so perpetrated through said artifice and device upon the said P. H. Williams at the time of said transaction, void.

V.

Further pleading in the alternative to the plea of legal mental incompetency, plaintiff shows to the Court that the said Lee & Lee referred to in defendant's first amended Original answer are and were at all times herein mentioned, general agents of defendant, having general charge of all of defendant's business in the State of Texas. That said Lee & Lee held a past due note payable to their order and executed by the said
62 P. H. Williams a long time prior to the said date of September 18, 1931, that said note was indorsed by Charles A. Poteet, local agent of defendant in Tom Green County, Texas. That the said Charles A. Poteet and the said Lee & Lee were desirous of securing the dividends on said policy for their own use and benefit and to apply same as a collection on said note. That defendant knew of the existence of said note and knew said purpose and design of said agents and connived and schemed with said agents to facilitate said purpose. That said agents and this defendant

well knew that the said P. H. Williams desired that said dividends be used in extending said policy as long and as far as same could thereby be extended; and well knew that he did not desire said dividends to be used for any other purpose.

Prior to September 18, 1931, and afer July 11, 1931, defendant, acting by and through its local agent, Charles A. Poteet, and the said Charles A. Poteet, agent aforesaid, had represented to the said insured that any application of the 1931 dividend to extending the policy or for his benefit was ineffective without the consent of the said Lee & Lee; and the company would refuse to recognize any such application without the consent of the said Lee & Lee thereto; that said statements and representations were made on or about August 18, 1931. They, the said agents and said company, well knew the said policy was in force and effect as extended insurance as alleged in plaintiff's first amended original petition on September 18, 1931. That on or about said date of September 18, 1931, said Lee & Lee prepared said order reciting at the top of it that the said policy had been lapsed and at a time when they knew the said P. H. Williams was sick in
63 bed and unable to transact business and unable to understand the nature and effect of any business transaction, went to his farm and procured his signature to said purported order.

This plaintiff says it is not true that the defendant ever received from the said Williams any written order and says that if same was ever received by the defendant or by anyone, it was received from the said Lee & Lee and at the time of receipt of said order from said Lee & Lee, the same had written at the top, a statement which was false and which this defendant knew to be false, to-wit: That the said policy was then of no force or effect. Plaintiff says that by virtue of the

said facts set out in this section said order is and was void on account of fraud as aforesaid, of defendant and its said agents. And in this connection, plaintiff says that in said transaction of September 18, 1931, said Lee & Lee were acting not only for themselves but as agents for defendant. That the defendant had been informed and believed that the said P. H. Williams would live only a short time and was seeking means to defeat liability under said policy.

VI.

Further pleading in the alternative to the plea of legal mental incompetency, plaintiff shows to the Court that if the said P. H. Williams had any understanding at all relating to said transaction, such understanding was based and predicated upon a mistake as to his rights and a mistake as to the existence of extended insurance, and in this connection, shows to the Court that on said date of September 18, 1931, the said P. H. Williams did not know or realize that said policy of insurance was in force and effect in the reduced amount of $9,085.97 as extended insurance; that if he had any understanding at all as to said instrument, he executed the same upon the assumption that there was then no insurance at all in force and in the execution of said instrument did not intend to make any disposition of dividends on a policy then in force and did not contemplate that he was engaging in any undertaking relating to insurance then in existence. That had he known or realized that said policy was in force and extended insurance or otherwise, he would not have signed said instrument, and this, defendants and its said agents, well knew; and said mistake on the part of the said P. H. Williams was induced by and accompanied by acts and representations of defendant set forth in the next two preceding subdivisions hereof; and the defendant well knew that

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in signing said instrument, the said P. H. Williams was acting under a misapprehension as to his rights in said policy contract.

Plaintiff further shows to the Court that at the time said instrument was presented to the said P. H. Williams for his signature, the policy was in the home office of defendant in Cincinnati, Ohio; and on said date of September 18, 1931, the mind and memory of the said P. H. Williams had become so impaired that he could not and did not remember the provisions of same and defendant well knew that he did not so remember same and that he did not remember the manner of calculation of said extended insurance and was incapable of making said calculations because the manner of calculation demanded a knowledge of insurance which he did not have, all of which facts and circumstances were well known to defendant and its said agents on said date of September 18, 1931, and at all times thereafter.

65 Plaintiff further says that on said date, the said P. H. Williams' condition, mental and physical, as hereinabove outlined, was at least such that he was incapable of reasoning about and weighing his rights in a business transaction with any degree of clarity. That on account of the foregoing facts and circumstances and the said mistake on the part of the said P. H. Williams, said purported instrumnet is ineffective to constitute any claim of defense on the part of defendant or any bar to plaintiff's right of recovery; and same should be held for naught.

VII.

Further pleading in the alternative to the plea of legal mental incompetency, plaintiff alleges that on said date of September 18, 1931, in procuring the signature

of the said P. H. Williams to said instrument, defendant and its said agents perpetrated a fraud on her as beneficiary of said policy and in this connection, alleges and shows to the Court that on said date, the physical condition of the said P. H. Williams was such that he could not then or thereafter, pass any physical examination for insurance which fact was apparent to and well known to defendant and its said agents; that said policy of insurance was taken out for her benefit and protection, a fact well known to defendant and its said agents, and although said policy contained a clause providing for a change of beneficiary, at the time the said P. H. Williams applied for said insurance, he stated in his application which was attached thereto and made a part thereof, that he had no intention of changing the beneficiary and he never did change said beneficiary and defendant and its said agents well knew that he never intended to make any change re-
66 lating thereto and well knew that it was his desire that said insurance be carried on as long as possible and continued in force in the form most beneficial to her and for her benefit, as long as possible, and defendant and its said agents well knew that on said date of September 18, 1931, the said P. H. Williams was in dire financial straits and well knew that he was hopelessly involved financially; well knew that this plaintiff had no resources in her separate right, save and except such benefits as might accrue to her under said policy of insurance and they well knew that by said transaction of September 18, 1931, she would receive no benefit and well knew that same would be used and invoked as a claim of defense seeking to bar and recovery on said policy; well knew that the days of said P. H. Williams were numbered and that in all probability, he would not outlive the period of extended insurance, and yet, knowing all of said facts and circumstances, defendant and its said agents dealt solely with the said P. H. Williams in his weak-

ened and enfeebled condition and although plaintiff was in the house and in an adjoining room thereof, the said emissaries of said defendant on said occasion of said September 18, 1931, did not reveal to this plaintiff the purpose of their visit; did not say anything to her about being there on a mission to secure the signature of the said P. H. Williams to any instrument concerning insurance and this plaintiff did not know that the said P. H. Williams had ever signed any such instrument until after his death and after this litigation had been instituted. In this connection, she alleges that before the death of the said P. H. Williams, she saw and conversed with the said Charles A. Poteet, Local Agent of defendant, on several occasions and said Charles A. Poteet never said a word to this plaintiff about the said P. H. Williams having exe-
67 uted any such instrument and never said a word to her advising her or contending that the defendant claimed that the said policy was not in force.

Plaintiff says that under the circumstances, it was the duty of the defendant and its said agents to advise plaintiff of their purpose in visiting him; to advise her of their plan to secure his signature to said instrument and that their silence under the circumstances, constituted a fraud on this plaintiff and that by virtue of said fraud, said instrument is unavailable to defendant as a plea in bar to plaintiff's right of recovery.

VIII.

Further pleading in the alternative to the plea of legal mental incompetency, plaintiff specially pleads estoppel, and says that by virtue of the facts and circumstances hereinbefore and hereinafter set forth, defendant is now estopped to say, claim or contend that the said P. H. Williams elected to take the 1931 divi-

dends in cash; and is estopped to say that said dividends were paid in cash; and is estopped to invoke any provision of the polic pertaining to the payment of dividends in cash.

In this connection, plaintiff shows to the Court that at no time at or about the expiration of the thirty-one days of grace, and at no time prior thereto, did defendant pay or tender to the said P. H. Williams said 1931 dividends in cash and never did do so; and the first communication from defendant to the said P. H. Williams concerning said dividends (that is, the first subsequent to the notice sent to him on or about
68 June 10, 1931, and set forth in plaintiff's first amended riginal petition), was contained in a letter on the stationery of said company, signed by Chas. A. Poteet, its local agent aforesaid; said letter being dated August 18, 1931. Said letter was addressed to the said P. H. Williams at Tankersley, Texas, and set forth in substance that the policy had lapsed; that there were some dividends to the credit of said policy; that the defendant had issued voucher therefor payable to the order of Lee & Lee. That Lee & Lee insisted on the said dividends being paid to them, to be applied by them on a note held by them. That unless he, the said P. H. Williams, agreed to the dividends being so paid to the said Lee & Lee, said vouchers would be returned, and the said Lee & Lee would then "proceed as they see fit"—said phrase implying that they, the said Lee & Lee , would sue him, the said P. H. Williams.

Plaintiff further shows to the Court that the said P. H. Williams never saw said policy after June, 1930, same being in the possession of defendant, in its home office in Cincinnati, Ohio. That by July 10, 1931, his memory had become so impaired by financial worry and disease, that he could not and did not remember

the provisions of said policy relating to dividends and the disposition thereof; and he relied upon defendant to inform him truly as to same; and defendant well knew that he so relied upon it. And defendant was bound to act in the utmost good faith and to disclose fully and fairly the said provisions, and his rights thereunder.

In this connection, plaintiff shows to the Court that said policy contains thirty-five sections or paragraphs; that the determination of the nature and application of said dividends and the insured's rights per-
69 taining thereto involves a consideration of at least the first twenty-three sections or paragraphs—all dealing with a technical subject concerning which defendant was possessed of expert knowledge and skill and in which the insured was wholly unversed; and it was humanly impossible for the said P. H. Williams to carry in his memory said provisions over a period of a year; and defendant well knew that on the alleged date of lapse and at all times thereafter, he was in ignorance of said provisions and in ignorance of his rights thereunder; and well knew that he relied upon it to inform him concerning same and to deal fairly and above-board with him.

Thus defendant was possessed of a superior knowledge, and held a position of advantage; and was acting in a confidential relation; notwithstanding which, defendant designedly, and in utter violation of the trust and confidence which it knew P. H. Williams reposed in it, pursued as aforesaid, a course of conduct calculated to conceal from him said provisions of said policy and his rights relating thereto; and said course of conduct did produce said result, and did mislead the said P. H. Williams, and was the proximate cause of his signing the purported dividend order pleaded by defendant.

Defendant was not seeking to pay said dividends in cash to the insured, was not acting under or in accordance with the provisions of the policy contract, but

had in view, solely the making of a collection for its said agents and securing a written admission that the policy was not in force and adhered to said purpose until the signature of the said P. H. Williams was obtained on said order, September 18, 1931.

Having by its said unfair course of conduct so induced and caused the said P. H. Williams to execute said purported order, defendant is estopped to now say that he elected that said dividends be paid in cash; and is estopped to invoke any clause of said policy providing for the payment of dividends in cash; and is estopped to invoke said purported order as any ground of defense to plaintiff's cause of action.

70

IX.

Plaintiff further shows to the Court that she has tendered to defendant the amount alleged by it to have been paid to the said Lee & Lee, to-wit: The sum of $74.80, with interest from September 18, 1931, at 10% per annum, and the said defendant has refused to accept said sum and plaintiff now here tenders said sum to defendant and brings same into Court as a tender aforesaid.

X.

Plaintiff further shows to the Court that the said purported order was and is null and void in that same is in contravention of Articles 578 and 580B of the Penal Code of the State of Texas and on account of the provisions of said articles, same never had any legal force or effect whatsoever.

XI.

Plaintiff further shows to the Court that the said Chas. A. Poteet is now and has been at all times

and continuously since June, 1916, the local agent of defendant, at San Angelo, Texas, with a territory embracing 12 counties in said state. That throughout the years, 1927 to 1931, inclusive, the defendant, The Union Central Life Insurance Company, held the said Chas. A. Poteet forth to the general public as its representative at San Angelo, Texas, with all
71 the powers and authority ordinarily and customarily possessed and exercised by the local agent of a life insurance company. That throughout the years, 1927, 1928, 1929, 1930 and 1931, the said Chas. A. Poteet, of San Angelo, Texas, continuously and with the knowledge and consent of defendant, held himself forth to the general public at San Angelo, Texas, as the representative of the said The Union Central Life Insurance Company with all the authority and powers ordinarily and customarily exercised by the local agent of a life insurance company. That throughout the entire period extending from July 6, 1927, to September 18, 1931, both dates inclusive, the defendant, The Union Central Life Insurance Company, held Chas. A. Poteet forth to the said P. H. Williams as its representative at San Angelo, Texas, with all the authority and powers ordinarily and customarily exercised by the local agent of a life insurance company. That throughout the entire period from July 6, 1927, to September 18, 1931, both dates inclusive, Chas. A. Poteet, within the knowledge and with the consent of the defendant, held himself forth to the said P. H. Williams as a representative of The Union Central Life Insurance Company with all the powers and authority ordinarily exercised by a local agent of a life insurance company.

Plaintiff further alleges that among the powers ordinarily and customarily exercised by the local agent of a life insurance company, is the power and function to explain at any and all times, to policy holders of the company, the non-forfeiture provisions and benefits of the policies; to explain to the policy holder, his rights

under the policy and especially his rights upon and after default in the payment of any premium,
72 and especially the rights of the policy holder with reference to dividends and the application of same under the policy. The local agent of a life insurance company also ordinarily and customarily acts as and is the alter ego of the company in all things pertaining or relating to the election on the part of the insured as to the application of dividends and ordinarily and customarily acts as and is the alter ego of the company in all matters relating to the policy of insurance insofar as the insured is concerned; the only limitation upon his authority being that he has not the power to alter the provisions of the application or policy.

Plaintiff further alleges that at all times hereinabove mentioned, defendant held Lee & Lee of Dallas, Texas, forth to the general public as its general agents, and especially held them forth to P. H. Williams as general agents of defendant for approximately twenty years and the said Lee & Lee, with the knowledge and with the consent of defendant, held themselves forth to the said P. H. Williams as the representative of the company with all the powers and authority ordinarily exercised by general agents of a life insurance company.

Plaintiff further alleges that the powers ordinarily and customarily exercised by the general agents of a life insurance company embrace and include all powers and authority possessed by the executive officers of the company relating to the business of life insurance and that in all matters, the general agents of a life insurance company are the alter ego of the company.

Plaintiff further says that said customs re-
73 lating to the powers ordinarily exercised by a local agent and those ordinarily exercised by a general agent are universal and general among all life insurance companies.

Wherefore, plaintiff prays that she recover of defendant as prayed for in her first amended original petition.

CHAS. GIBBS,
McGOWAN & McGOWAN,
ANDERSON, ORR & McCORD,
J. W. STOVALL,
H. O. WILLIAMS,
Attorneys for Plaintiff.

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74 "DEFENDANT'S FIRST SUPPLEMENTAL ANSWER."

Filed Oct. 20, 1932.

(Title Omitted.)

To the said Honorable Court:

Now comes The Union Central Life Insurance Company, defendant in the above styled cause, and for answer to the plaintiff's first supplemental petition and to any amendment thereof that has been or that hereafter may be filed, avers:

1. The defendant excepts to the said supplemental petition and says that the same is insufficient in law to require of the defendant any further answer thereto.

2. The defendant denies each and every allegation contained in such petition.

3. The defendant especially denies that Peter Hardy Williams, at the time he executed the instrument dated September 18, 1931, was mentally incompetent or that he was in a stupor, or dazed, or that he did not understand what he was doing when he signed such instru-

ment. The defendant especially denies that the said Williams was induced to execute said instrument through any misrepresentation of fact, or through any mistake, and denies that any facts were misrepresented to the said Williams, or that he made any mistake, as charged by the plaintiff. On the contrary, the defendant is informed and believes, and therefore avers, that at the time of such transaction, as well as at all times prior thereto, the said defendant was, and gave no indication of being otherwise than, entirely compos mentis, rational and alert, and thoroughly understanding the nature of such instrument.

75

The defendant received said instrument, and had no knowledge or information that the said Peter Hardy Williams was, or was claimed to be, otherwise than entirely compos mentis, rational and alert, or that he did not thoroughly understand and intend, or was claimed not to have thoroughly understood and intended, the effect of such instrument; and prior to the death of the said Williams, the defendant had no knowledge or information that the said Peter Hardy Williams was induced, or was claimed to have been induced, to execute such instrument through any mistake or misrepresentation of fact; and, accordingly, the defendant relied upon such instrument as a direction to it to pay such dividends to Lee & Lee, and therefore, on or about September 29, 1931, before the death of the said Peter Hardy Williams, the defendant did pay the same to Lee & Lee.

4. If the payment of the amount of the dividends in cash to Lee & Lee, pursuant to the instrument dated September 18, 1931, be held and adjudicated, for any reason, not to constitute a valid payment and discharge of the defendant from further obligation to pay the amount of such dividends, then the defendant is willing, and hereby offers, to pay the amount of such dividends to the plaintiff, or to whatever person may be entitled to receive the same, or

into the registry of the Court, as this Court may require, or as to it may seem proper, and the defendant otherwise offers to do full and complete equity in the premises.

76 5. The plaintiff is not entitled, under the terms of any policy issued to the said Willians, to tender to the defendant the amount of such dividends paid to Lee & Lee, but if the plaintiff ever was entitled to make said tender, which was not made until October, 1932, the said tender comes only after the payment of said dividends to Lee & Lee by the defendant in reliance on said instrument of September 18, 1931, and only after the death of the insured, and after the defendants' position has been materially changed for the worse; and in making such tender in October, 1932, for the first time, the plaintiff is guilty of laches.

Wherefore the defendant prays as in its first amended original answer.

LOCKE, LOCKE, STROUD & RANDOLPH,
RALPH RANDOLPH,
Attorneys for Defendant.

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77 "DEFENDANT'S REQUEST FOR INSTRUCTED VERDICT."

Filed October 21, 1932.

(Title Omitted.)

To the Honorable District Court:

Now, by its attorneys, comes the defendant, The Union Central Life Insurance Company, and at the close of all of the evidence adduced at the trial of this

cause, and after all parties have rested, and before any argument of counsel or the submission by the Court of any charge to the jury, requests the Court to give the following instruction to the jury:

"Under the competent and admissible evidence offered in this cause the plaintiff is not entitled to recover on any of the policies, in its original form or in any other form of insurance upon the life of Peter Hardy Williams, and you will now return a verdict for the defendant."

For that the undisputed evidence shows that none of the policies sued on was in force at the date of the death of the insured, Peter Hardy Williams, either in its original form or in any other form of insurance on the life of the said Peter Hardy Williams.

RALPH RANDOLPH,
LOCKE, LOCKE, STROUD & RANDOLPH,
Attorneys for the Defendant.

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78 "VERDICT OF THE JURY."

Filed Oct. 21, 1932.

(Title Omitted.)

We, the Jury, find for the plaintiff in the sum of $9101.12 plus $910.00 Attorney fees, plus 12% penalty, plus 6% interest from January 1st, 1932.

W. M. HOLLAND, Foreman.

79 "JUDGMENT."

Entered Oct. 21, 1932.

(Title Omitted.)

On the 20th day of October, 1932, came on to be heard the above entitled and numbered cause wherein Mrs. Nannie May Williams is plaintiff and The Union Central Life Insurance Company is defendant; and came the parties; and thereupon, defendant presented its Special Exception No. 2 contained in its first amended Original Answer, challenging the validity and constitutionality, particularly as applied to the circumstances of this case, of Article 4736 of the Revised Statutes of Texas, as amended by the Acts of 1931, 42nd Legislature, Chapter 81, which exception was by the Court overruled, and to such action of the Court, the defendant thereupon excepted. And thereupon, both parties announced ready for trial; and a jury composed of twelve good and lawful men, to-wit: W. M. Holland and eleven others, all legally qualified jurors, were duly selected, impaneled and sworn; at the conclusion of the evidence after both the plaintiff and the defendant had rested, the defendant filed a written request that the Court instruct the jury to return a verdict in favor of the defendant, which request was then refused by the Court; and to which action of the Court, the defendant thereupon excepted; and having heard the pleadings, evidence, argument of counsel and the charge of the Court, the said jury, on the 21 day of October, 1932, and in response to the charge, returned into open Court, their verdict, as follows:

80 "We, the jury, find for the plaintiff in the sum of $9101.12 plus $910.00 atty. fees plus 12% penalty plus 6% interest from Jany. 1st, 1932.

W. M. HOLLAND,
Foreman."

And it appearing therefrom and from the stipulations of the parties on file in this cause and from the law applicable to the case, that plaintiff is entitled to recover of and from the defendant, the sum of Eleven Thousand, Five Hundred Twelve and 75/100 Dollars ($11,512.75);

It is, therefore, ordered, adjudged and decreed by the Court that the said plaintiff, Mrs. Nannie May Williams, do have and recover of the said defendant, The Union Central Life Insurance Company, the sum of Eleven Thousand, Five Hundred Twelve and 75/100 Dollars ($11,512.75), with interest thereon at the rate of six per cent (6%) per annum from date hereof, together with her costs in this behalf expended and that she have her execution.

To such respective actions of the jury and of the Court, the defendant thereupon, in open Court, severally excepted. The defendant is hereby allowed thirty (30) days from this date, to-wit: October 24th, 1932, for the preparation of, settling and perfecting bills of exception and the record of the evidence.

Dated this 24th day of October, A. D. 1932.

WM. H. ATWALL,
Trial Judge.

Entered as of October 21, 1932, in the minutes of said Court, in column 3, at page 85.

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81 "MOTION FOR NEW TRIAL."

Filed Oct. 27, 1932.

(Title Omitted.)

To the said Honorable Court:

Now, by its attorneys, comes The Union Central Life Insurance Company, defendant in the above

styled cause, and moves the Court to set aside the verdict heretofore returned therein by the jury and the judgment of the Court entered upon such verdict and to grant to the defendant a new trial in said cause. As grounds for said motion, it shows unto the Court as follows:

1. The evidence offered on the subject of mental incompetency of Peter Hardy Williams at the time of the execution, on September 18, 1931, of the order, was insufficient to warrant the submission of such issue to the jury, and insufficient to support the verdict.

2. The evidence offered was insufficient to warrant the submission to the jury of any issue of any right of Peter Hardy Williams, or of the exercise by Peter Hardy Williams of any right, to use the dividend of June 10, 1931, in the purchase of extended term insurance, and insufficient to support the verdict.

3. The Court erred in refusing to grant the defendant's request and motion for an instructed verdict, for that the defendant was entitled to have a verdict directed in its favor on the grounds set out in such request and motion.

82 4. The Court erred in its charge to the jury as a whole, for that such charge was contrary to the provision in the policy providing that if the policy shall lapse the dividend then due shall be paid in cash, and for that such charge construed the policy as permitting, contrary to the valid provisions of the policy, the use of such dividend for the purchase of extended term insurance.

5. The Court erred in its charge to the jury in referring to accumulations of dividends at interest, for that the competent and undisputed evidence estab-

lished that there were no accumulations of dividends at interest, there being merely one dividend undisposed of at the time the policy lapsed.

6. The Court erred in charging the jury in substance that if the plaintiff established by a preponderance of the evidence the issuance of the policy, the obligation of the defendant to pay it, the amount of money for a dividend that was due the deceased, and his insanity then the plaintiff would be entitled to recover, for that such charge was contrary to the evidence and contrary to the valid provisions of the policy, which provided that if the policy should lapse, the dividend then due should not be used for the purchase of insurance but should be paid in cash.

7. The Court erred in charging the jury, in substance, that under the terms of the policy accumulations of dividends at interest might be applied to the purchase of extended insurance and that it was permissible for the insured to use the earned and unused 1931 dividend of $74.80 for the purchase of
83 extended insurance, for that there was no evidence of any accumulation of dividends at interest, all of the evidence being to the effect that there was no accumulation of dividends at interest, and for that the policy, properly construed, expressly provided, and the insured expressly agreed, that if the policy should lapse, the dividend should be paid in cash, and for that there was no provision in the policy that the dividend then due might be used for the purchase of extended insurance, there being no option to that effect.

8. The Court erred in charging the jury, in substance, that if the jury should find that the insured used such dividend to buy extended insurance, the jury should find for the plaintiff, for that there was no evidence that the insured ever so used such dividend, or

in any event, the evidence was insufficient to submit such issue to the jury, and for that such charge was contrary to the express policy provision that if the policy should lapse the dividend then due should be paid in cash.

9. The Court erred in charging the jury, in effect, that the jury might determine whteher or not, under all the circumstances of the case, the insured ordered and was entitled to have the 1931 dividend purchase extended insurance, for that such charge is contrary to the valid provision of the policy that if the policy shall lapse, the dividend then due shall be used in cash, and for that there was no evidence that the insured ever so used, or was entitled so to use, such dividend.

10. The Court erred in charging the jury, in substance, that if the jury found that the insured, at the date of executing the order to Lee & Lee to
84 collect the 1931 dividends due the insured, thereby applied them upon the debt which the insured owed to Lee & Lee, and if they found that the insured did not know what he was doing, then the jury should find for the plaintiff, for that there was no basis in the evidence for the submission of such issue of mental competency to the jury, and for that such portion of the charge was contrary to the provision of the policy to the effect that if the policy should lapse the dividend should be paid in cash, there being no provision in the policy for the use of the dividend for the purchase of extended insurance.

11. The Court erred in its charge to the jury in submitting to the jury any issue of mental competency of the insured, for that the evidence is insufficient to justify such submission.

12. The Court erred in charging the jury in such portions of the charge as expressed or implied that

the insured had the right under the policy to the use of the 1931 dividend for the purchase of extended insurance, for that the same is contrary to the evidence and to the valid provisions of the policy.

13. The Court erred in its charge to the jury in such portions of the charge as expressed or implied that the insured would exercise any right in any way to use the 1931 dividend for the purchase of extended insurance, for that there is no evidence of any such exercise or application.

14. The Court erred in its charge to the jury in all such portions of the charge as expressed or implied
85 that in the exercise of any right in any way to use the 1931 dividend for the purchase of extended insurance, the insured acted within the time specified in the policy for the exercise of any such right.

15. The Court erred in charging the jury that if they found for the plaintiff, they might find for attorney's fees and for penalties, for that the statute with reference to attorney's fees and penalties is unconstitutional, and for that the provisions in the statute with reference to the recovery of attorney's fees or penalties were not complied with in this case.

16. The Court erred in permitting the witness Dr. F. S. White, over the objection of the defendant, to testify, in answer to a hypothetical question put to him in behalf of the plaintiff, that in his opinion P. H. Williams was not in a condition to know the nature and effect of the signing of the order dated September 18, 1931, for that the sum total of the evidence introduced on the basis of which the hypothesis was stated was insufficient to form any basis for the framing of a hypothetical question to an alienist as to the mental capacity of P. H. Williams; for that the question,

taken as a whole, was too vague and indefinite in detail to form any basis for the rendering of an opinion by an alienist; for that, taken as a whole, there was no basis in the testimony for the assumption of fact stated to the witness; for that the assumption in such question that Williams had suffered a loss or lapse of memory as to recent events was objectionable on the ground that there was no specification of the things not remembered or of the surrounding
86 circumstances or of the dates of such matters; for that the assumptions in such question, as to some signs of occasional indisposition apparent to the wife as to material or appreciable physical exertion, followed at some vague and indefinite time by a lack of material or appreciable physical exertion on the part of said Williams, as to Williams' not being able to bear in his memory from one day to another directions given by him to people on his farm, as to Williams' at times holding his hands to his side, as to Williams' on several occasions being observed sitting in his car, drooped and downcast, as to Williams' after going to San Angelo to consult doctors, being part of the time in bed and part of the time not, as to Williams' suffering a shortening of breath so much that at times he had to sit up and be propped up, were too vague and indefinite to form any basis for the expression of opinion by an alienist as to Williams' mental capacity; for that there was no basis in the testimony for the assumption of facts states in the question with reference to Williams' not being able to bear in his memory from one day to another directions that he had given; for that the assumption in such question with reference to certain witnesses' having noticed a change in Williams' condition or a marked change in condition, mentally and physically, did not inform the alienist as to what changes were; and for that in other respects, too numerous to mention, the question was too vague and indefinite, and for

that in other respects too numerous to mention there was no basis in the testimony for the facts assumed.

87 17. The Court erred in refusing, over the objection of the plaintiff, to permit the witness W. F. Pattison, whose testimony was taken by deposition, to testify that the company had a uniform custom or usage in the transaction of its business with reference to the matter of payment of dividends on order of the policy holder, when information was possessed by the company that such policyholder was non compos mentis, and to testify what such uniform custom or usage was, and from such uniform custom or usage, what the company would have done with reference to the disposition of the 1931 dividend if it had had any information that P. H. Williams was non compos mentis or was claimed to be non compos mentis.

Respectfully submitted,
LOCK, LOCK, STROUD & RANDOLPH,
RALPH RANDOLPH,
Attorneys for the Defendant.

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88 "ORDER OVERRULING MOTION FOR NEW TRIAL."

Entered Oct. 27, 1932.

(Title Omitted.)

On this the 27th day of October, 1932, came on for hearing in the above styled cause the motion for a new trial filed by the defendant, The Union Central Life Insurance Company; and after hearing argument, the Court is of the opinion that such motion should be overruled. It is, therefore, ordered and decreed that

the said motion for a new trial be, and the same is hereby overruled; to such action of the Court, the defendant thereupon in open Court, excepted.

The defendant is hereby allowed thirty (30) days from this date, to-wit: October 27th, 1932, for the preparation of settling, perfecting and filing bills of exception and settling all matters pertaining to the evidence, and the term of the Court is hereby extended for such purpose.

WM. H. ATWELL,
District Judge Presiding.

Entered October 27, 1932, in the minutes of said Court, in volume 3, at page 94.

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89 "DEFENDANT'S BILL OF EXCEPTIONS."

Filed Nov. 19, 1932.

(Title Omitted.)

Be it remembered that on the 20th and 21st days of October, 1932, the above styled cause came on to be heard before the Court above named, to-wit: Before the Honorable William H. Atwell, United States District Judge presiding, and a jury impaneled and sworn, Messrs. Charles Gibbs, H. O. Williams, Austin F. Anderson and H. T. McGowan, Appearing as counsel for the plaintiff, and Messrs. Eugene P. Locke and Ralph Randolph appearing as counsel for the defendant.

Thereupon, after the pleadings had been settled, the following proceedings were had, and facts were proven or agreed upon and evidence was introduced, as fol-

lows, in so far as the facts and evidence are material to this bill of exceptions.

2.

It was agreed that Charles A. Poteet was at all times throughout the years 1927 to 1931, both years inclusive, the local agent of The Union Central Life Insurance Company at San Angelo, Texas; that the said Charles A. Proteet took the application of P. H. (Peter Hardy) Williams and delivered the policy involved in this suit to the said P. H. Williams in Tom Green County, Texas; that all premiums on each policy due to and including June 10, 1930, were duly paid to the defendant and that the annual premiums maturing June 10, 1931, were not paid, that prior to the application for the policy and prior to the issuance thereof, the said defendant, The Union Cen-
90 tral Life Insurance Company, had secured a permit to do business in the State of Texas and a license to do business in the State of Texas upon its application made therefor, as a life insurance (legal reserve) company operating under the statutes of the State of Texas pertaining to such kind and character of insurance companies, and at all times thereafter so operated under said permit and license; that said defendant is a private corporation, incorporated under the laws of the State of Ohio, and was such on the date of the application for the permit and on the date of the issuance thereof.

It was further agreed that the plaintiff tendered to the defendant on October 1, 1932, the amount of the dividend for the year 1931, accruing upon the policy of insurance involved in this suit, together with interest thereon at 10 per cent. from September 18, 1931; that such tender was refused by the defendant; and that the necessity of further tender of said amount in Court may be dispensed with.

3.

The policy of insurance sued upon was introduced in evidence by the plaintiff. Its provisions relevant to this bill of exceptions are as follows:

"The Union Central Life Insurance Company,
Cincinnati, Ohio.
No. 940457.

Hereby Insures the Life

1. Insured of Peter Hardy Williams in

2. Amount—the amount of Ten Thousand Dollars,

91 3. Death Claim payable on receipt of due proof of death of said insured during the continuance of this policy, less any indebtedness and advances hereon and any unpaid portion of the premium for the current policy year, at its Home Office in Cincinnati, Ohio, to

4. Beneficiary—Nannie May Williams, his wife, if living at the death of the insured, otherwise to the administrators, executors or assigns of the insured.

5. Premium—This policy is issued in consideration of a premium of Four Hundred Forty-Nine & 10/100 Dollars and of the payment of a like amount Annually on the Tenth day of June in every year during the lifetime of the insured.

6. Conditions—All conditions, benefits and provisions stated on the subsequent pages are hereby made a part of this policy.

7. Date—In witness whereof, The Union Central Life Insurance Company has caused this contract to

be signed in the City of Cincinnati, State of Ohio, this twenty sixth day of July one Thousand nine hundred and twenty seven.

(Sgd.) JOHN D. SAGE,
President.
(Sgd.) R. F. RUST,
Secretary.
(Sgd.) R. W. FLYNT,
Registrar.

(Edition Jan. 1923.)

(P. 2.) "Premiums and Dividends.

92 "8. Payment of Premiums. All premiums shall be payable in advance, either at the Home Office, or to an authorized agent of the Company on delivery of a receipt signed by the President or Secretary and countersigned by such agent.

"Failure to pay any of the first two years' premiums, or instalment thereof, shall avoid and nullify this contract.

"After two full years' premiums have been paid, on failure to pay any subsequent premium, this policy shall lapse and its value, if any, shall be applied as set forth in article sixteen.

"The note of the insured or the beneficiary, or their assigns, shall be accepted in payment of the second or subsequent year's premium, or part thereof, if the surrender value of the policy shall equal or exceed such note and any other indebtedness on the policy. Any note accepted in payment of a premium shall be a first lien on the policy and a set-off in the calculation of policy values.

"9. Grace. A grace of thirty-one days shall be granted for the payment of any premium after the first.

In event of the death of the insured during the days of grace the insurance shall be deemed to be in force, and any unpaid premium for the current policy year shall be deducted from the sum payable.

"10. Dividends. This policy shall participate in profits, as apportioned by the directors. Beginning at the end of the first policy year, provided the second year's premium is paid, dividends shall be declared annually during its continuance.

"11. Dividend Options. Dividends may be withdrawn in cash; or applied to the payment of premiums; or left to accumulate with interest at three per cent, increased from surplus interest earnings as 93 apportioned by the Directors, until the maturity of the policy, subject to withdrawal at any time; or applied to the purchase of paid-up participating additions to the policy, convertible into cash at any time for the amount of the original dividends or the reserve of the additions, if larger, but payment may be deferred by the Company ninety days from the date of application therefor.

"12. Automatic Disposition. On payment of the premium, or on the policy anniversary if no further premium is payable, if no other option has been elected, the dividend then due shall be applied to the purchase of paid-up additions. In the event of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected, or if the policy shall lapse, the dividend then due shall be paid in cash. At the death of the insured during the continuance of the policy, the pro rata part of the dividend for the current policy year shall be paid in cash.

"13. Policy May Be Paid-Up. At the fifth or any subsequent anniversary this policy will be indorsed

fully paid-up on payment, by dividend credits or otherwise, of the difference between the reserve of this policy and the corresponding net single premium at the attained age.

"Policy Values."

"14. Reserve Basis. The reserve of this policy is computed on the American Experience Table of Mortality with interest 3½%.

94 "15. Surrender Value. After two full years' premiums have been paid, the surrender value for each thousand dollars of insurance is equal to the reserve at the end of the policy year, omitting cents, except that in the second, third and fourth policy years, it is equal to the reserve at the end of the policy year, taken to the nearest dollar, less surrender charges of $21, $13 and $6 respectively.

"16. Policy Values. The surrender value may be used at the option of the owner of the policy in any one of the following ways, all of equal value, as set forth in the following tables, provided there be no indebtedness or advances on the policy. If, on failure to pay a premium, no option is exercised, such value shall be applied as provided in Option 1.

"17. Option 1—Extended Insurance. Applied to the extension of this policy as participating term insurance from the date to which premiums have been paid, without any further payment (Table 1.) The value of any paid-up additions will be used to increase the term of extension. Accumulations of dividends at interest may be applied to increase the term of extension. Dividends on extended insurance shall be paid in cash and only for completed policy years.

"18. Option 2—Paid up Insurance. Applied to the purchase of paid-up participating insurance, on written request and the surrender of the policy before the expiration of the days of grace (Table 2.) Any paid-up additions will be added to the amount of the paid-up insurance. Accumulations of dividends at interest may be applied to purchase additional paid-up insurance provided the total amount of paid-up insurance shall not exceed the face amount of the policy. Dividends on paid-up insurance shall be paid in
95 cash.

"19. Option 3—Loan. Borrowed or taken in advance in whole or in part on the sole security of the policy, on assignment thereof, less the unpaid balance of the current year's premium and any indebtedness and previous advance on this policy, at six per cent interest payable annually on the anniversary of the policy, interest to be discounted and paid in advance (Table 3).

"Failure to repay any such advance or to pay interest shall avoid this policy whenever but not until the total indebtedness and advances hereon with interest shall equal or exceed the then loan value and not until one month after notice shall have been mailed by the Company to the last known address of the insured, and of the assignee, if any.

"The loan value will be increased by the value of any paid-up additions.

"The loan value, less interest to next anniversary, is available at any time during the policy year if premiums have been paid to the end of the year.

"Consummation of loans other than to pay premiums on policies in this Company may be deterred by the Company ninety days from the date of application therefor.

"20. Option 4—Cash. Collected in cash on written surrender of the policy before the expiration of the days of grace (Table 4). The cash value will be increased by the value of any paid-up additions. Payment may be deferred by the Company ninety days from the date of application therefor.

"21. Credit for Fractional Premiums. If default shall occur at any time other than the end of the policy year the values for the preceding policy year shall be proportionately increased for the portion of the policy year for which premiums have been paid.

96

"2. Deduction of Indebtedness. If there be any indebtedness or advances on this policy, the cash value shall be reduced thereby; the paid-up value shall be reduced proportionately; and the extended insurance shall be for the face value of the policy less the indebtedness and advances and for such term as said reduced cash value will provide.

"23. Tables of Values. The values in these tables are on the basis of $1,000 of insurance, assuming all premiums to have been paid when due. If this policy is for insurance of more or less than $1,000, the paid-up insurance, loan and cash values are increased or reduced proportionately. The term of extended insurance does not vary with the amount of insurance. The surrender charge has been deducted. Values for the years not stated will be furnished on application.

Age 51. Ordinary Life.

End of Year.	1. Extended Insurance.	2. Paid up Insurance. for each $1000 of the sum insured.	3. Loan or 4. Cash.	End of Year.
2	1 year, 250 days	$ 49	$ 27	2
3	3 years, 165 days	107	59	3
4	4 years, 330 days	160	91	4
5	6 years, 25 days	210	121	5

97 General Privileges and Conditions.

"24. Contract. This policy, together with the application, a copy of which is indorsed hereon or securely attached hereto, shall constitute and contain the entire contract. All statements shall, in the absence of fraud, be deemed representations and not warranties. No such statement shall avoid this policy or be used in defense to a claim thereunder, unless it is contained in the written application, and unless a copy of such application is indorsed on or attached to the policy when issued.

"25. Change of Beneficiary. Unless it is stated on the first page hereof that the policy is without privilege of change of beneficiary, the insured without the consent of any beneficiary, may exercise every right and receive every benefit reserved to the insured, or the owner of the policy, or agree with the Company to any change in or amendment to the policy, and shall have the right at any time to change the beneficiary, by written notice to the company at the Home Office, for which a form will be furnished on request.

"26. Reinstatement. This policy will be reinstated at any time within three years after default in payment of premium, provided it has not been surrendered, on evidence of insurability satisfactory to the Company and the payment of premium arrears with six per cent interest per annum and the payment or reinstatement of any other indebtedness and advances hereon with accumulated interest.

"27. Privilege of Change. The insured shall have the privilege on thirty days' written notice and the surrender of this policy prior to lapse, to have substituted therefor at any time without medical examination of Life or Endownment policy (except a continuous instalment policy or a policy with disability bene-

fits) of the same amount with a higher premium written at the same age and bearing the same date; if the change is made within five years of the valuation date of issue, on payment of the differences in premiums with interest at six per cent per annum, compounded annually from their respective due dates to the date of exchange; if after five years on payment in cash of the difference in surrender values.

98

"28. Incontestability. This policy shall be incontestable after two years from the date of issue, except for non-payment of premium or for violation of the provisions of this policy, if any, relating to military and naval service in time of war.

"29. Age. In event of the age of the insured being misstated, the amount payable, and the term of extended insurance, if any, shall be such as the premium paid would have purchased at the correct age.

"30. Suicide. This policy shall be null and void, except for the amount of permium paid, if the insured shall die within one year by self-destruction, whether sane or insane.

"31. Authority. None of the terms of this policy shall be modified, nor any forfeiture under it waived, save by an agreement in writing, signed by the President, a Vice-President, the Secretary or an Assistant Secretary, whose authority for this purpose shall not be delegated."

The only other provisions contained in the policy, in addition to the table of values beyond the fifth year, pertained to certain settlement options in lieu of payment under the policy in a single sum. The omitted provisions are not relevant to the present litigation.

The plaintiff introduced in evidence the policy loan agreement dated June 10, 1930, reading as follows:

"This advance may be paid in full or in part at any time.

99 "858.00.

Cincinnati, Ohio, June 10, 1930.

"In consideration of an advance of Eight Hundred Fifty-Eight & 00/100 Dollars by The Union Central Life Insurance Company, of Cincinnati, Ohio, the receipt of which is hereby acknowledged, I hereby assign to and deposit with said Company as sole security for said advance and interest its Policy No. 940457, on the life of Peter H. Williams, together with the paid-up additions thereto, if any, and

"I hereby agree with said Company: 1. To pay interest on said advance at the rate of six per centum per annum, payable annually at the Home Office of said Company in Cincinnati, Ohio.

"2. On default in payment of any premium on said policy, the policy shall lapse and this advance, with accrued interest and any other indebtedness on said policy, shall be deducted from the surrender value of the policy (which if not otherwise stated therein, shall be the reserve value of the extended insurance provided therein, on the valuation reserve basis of the policy) and the balance, if any, of such surrender value shall be applied as provided in the policy (or, if there is no such policy provision, in accordance with the Company's rules.)

"3. If the interest on this advance is not paid when due, no default having been made in payment of premium, such interest shall become a part of the prin-

cipal and bear interest in the same manner, and if the total indebtedness and advances on the policy shall equal or exceed the then loan value said policy shall thereupon become null and void, and shall be deemed to be surrendered in consideration of the cancellation of said advance, and any indebtedness on said policy; provided, however, that failure to repay said
100 advance or to pay interest shall not avoid the policy unless the total indebtedness and advances thereon, shall equal or exceed such loan value at the time of such failure and until thirty-one days after notice shall have been mailed to the insured and assignee, if any, during which time the payment of any indebtedness and advances will be accepted.

"4. The amount of this advance and accrued interest shall be deducted from any amount payable under the said policy.

"5. Any notes given from premiums, with interest, shall be deducted from this advance.

"6. The said Company is hereby requested to draw the check or draft issued in connection with this advance to the order of .....

"7. For the purpose of obtaining this advance, I hereby declare that I have made no assignment of said policy, and that no petition that I be adjudged a bankrupt has ever been filed by or against me.

(Sgd.) PETTER H. WILLIAMS,
Insured."

P. O. Address:
Street and No. 236 W. Bugard,
Town San Angelo.
County and State, Tom Green Co., Tex.

On the reverse side was the following credit:

"The Loan or Advance covered by the within Agreement has been reduced in amount as shown by the following indorsement:

Amount of Repayment.	Date of Repayment.	Balance.
$10.00	6-10-30	$848.00"

5.

Deposition of W. F. Pattison.

The plaintiff introduced portions of the deposition of W. F. PATTISON, taken by the defendant on written interrogatories, as follows:

101 From Direct Examination.

I am an assistant secretary of the Union Central Life Insurance Company. I have held such position since 1922. While assistant secretary I have had charge of the adjustment and payment of claims, and up to January, 1932, had charge of the policy loans. The policy in suit, along with other policies issued to P. H. Williams, was assigned by him to the company as security for loans made to him by the company in June, 1930, and since then they have been in the possession of the company.

A dividend was declared under each of such policies, June 10, 1931, in favor of Peter Hardy Williams, as follows:

Dividend under policy No. 940457—$ 74.80
Dividend under policy No. 937853— 112.20
Dividend under policy No. 989365— 184.75
Dividend under policy No. 989375— 184.75
Dividend under policy No. 989385— 110.85

From Cross Examination.

The policies have been in the possession of the company at its Home Office continuously since about June 25, 1930.

A check covering the 1931 dividends, made payable to the order of the insured, was sent to Messrs. Lee & Lee, the company's general agents at Dallas, which check was returned through the mail to the company by a letter dated September 14, 1931. That letter is now in the possession of the Company, and I attach the original to my deposition. I attach also a letter from Lee & Lee dated September 19, 1931. No letter relating to the 1931 dividends or to the status of the policies subsequent to June 10, 1931, was received at the home office from Charles A. Poteet.

102 No representative of the company at the home office ever sent any checks or vouchers for the 1931 dividends to P. H. Williams, in an envelope or by any communication addressed to him.

According to the company's records, in June, July, August and September, 1931, the address of P. H. Williams was Central Hotel, San Angelo, Texas. Neither the Company nor any officer thereof ever gave to P. H. Williams, the insured, any notice of any limitation on the authority or powers of Charles A. Poteet, its local agent at San Angelo, Texas, or of Lee & Lee, its general agents at Dallas, Texas, other than as contained in the policy and application and other than as contained in the following clause of the communication relating to the 1931 premium and dividend (being the instrument set forth in Section 6 hereof):

"Agents are not authorized to countersign receipts, unless signed by some officer of the Company, to grant permits, make or alter contracts, waive forfeitures or make any alterations of a renewal receipt."

It is true that the company has for a continuous period of time extending back to June 1, 1927, held

forth to the general public and to P. H. Williams, Charles A. Poteet as its representative at San Angelo and adjacent territory, including Tom Green and Irion Counties, with all of the authority and powers ordinarily and customarily exercised by the local agent of a life insurance company. It is true that throughout such period Charles A. Poteet has continuously, and with the knowledge and consent of the company, held himself forth to the general public and to P. H. Williams as the local representative of the company, with all of the authority and powers ordinarily and customarily exercised by the local agent of a life insurance
103 company. It is true that the Company has throughout such period held forth to the general public and to P. H. Williams, Lee & Lee as its representatives at Dallas, Texas, with all of the powers and authority ordinarily and customarily exercised by the general agents of a life insurance company. It is true also, that throughout such period J. E. Lee and W. B. Lee, of Dallas, Texas, with the knowledge and consent of the Company, have held themselves forth to the general public as general agents of the Company at Dallas, with all of the powers and authority ordinarily exercised by general agents of a life insurance Company.

W. Howard Cox was secretary of The Union Central Life Insurance Company from April, 1928, to January 29, 1932. J. Schickle was, on November 12, 1931, the Company's manager of death claims. The photostatic copy attached to my deposition, of the letter, on the letterhead of The Union Central Life Insurance Company, dated November 12, 1931, addressed to "Mr. Charles Gibbs, Attorney, San Angelo National Bank Building, San Angelo, Texas," and signed, "J. Schickel, Manager, Claim Department," is a true copy of the letter mailed by the Company to Charles Gibbs on or about November 12, 1931.

The plaintiff introduced in evidence the following papers attached as exhibits to, and identified in, the deposition of W. F. Pattison, being letters from Lee & Lee, The Union Central Life Insurance Company's general agents at Dallas, to the respective officers of the Company at the Home Office addressed:

EXHIBIT A.

"Dallas, Texas, September 14, 1931.

Mr. C. D. Cary, Asst. Manager,
Dividend Div. Actuarial Dept.
Dear Sir:

"On yesterday we sent Secretary Cox a
104 night letter as per attached copy. We are handing you herein dividend check No. 149984 for $556.50, payable to Peter H. Williams for dividends on policies 937853, 940458, 989356 and 989357. As stated in the telegram to Mr. Cox we desire this check canceled for the reason that our attorneys are bringing suit against Mr. Williams with the action against the company stated in our telegram. Besides canceling this check we desire you to not issue the check for $110.85 on policy 989358 as we are including that in our garnishment against the Company. In regard to check No. 149983 for $184.75, payable to Peter H. Williams and the Continental Supply Company, we beg to advise that we are forwarding this to our agent at San Angelo with instructions to deliver it to Mr. Williams.

"In explanation of this suit against Mr. Williams and garnishment against the Company, we beg to say that in June, 1930, Mr. Williams Loan Values lacked $1643.63 of being enough to pay the annual premiums on all his policies. Against our judgment our Agent took Mr. Williams' promissory note payable to Lee & Lee and indorsed by him for this difference; at the time Mr. Poteet took this note we felt it was a very

unwise thing but having committed himself to Mr. Williams in that way we took the note and forwarded to the Company in cash the $1643.63. Ever since June 10th we have been endeavoring through our agent at San Angelo to get Mr. Williams to sign the surrender forms which we had the Company send out, apply part of this money to the payment of any premium on one of these policies for $15,000 and the balance of the dividends made payable to Lee & Lee as a partial payment on this note. Our Agent at San Angelo did not seem to press this matter with the proper
105 amount of energy in seeing Mr. Williams personally until finally about the first of September he did see Mr. Williams and Mr. Williams told him he was not going to sign the surrender vouchers with any part of it made payable to Lee & Lee, that it was a crooked deal and that he was going to have every nickle applied towards paying these policies as far as it would carry them. In the face of this cold blooded refusal of Mr. Williams we have had our attorney prepare papers suing Mr. Williams for the note and garnisheeing the Company for all of these dividends.

"You will, therefore, please observe our request of yesterday not to make any checks payable to Mr. Williams after canceling the one returned, and if any correspondence from him needs a reply kindly forward it to us until we shall have gotten service on all parties to this suit.

Very truly yours,
LEE & LEE, General Agents,
Jel. By (Sgd.) J. E. LEE.

P. S. "On advice of attorney today we are also returning for cancellation dividend check $184.75, payable to Williams and Continental Supply Company assignee, and request you to issue none in lieu thereof until the litigation in question shall have been determined.

(Sgd.) LEE & LEE."

EXHIBIT B.

Dallas, Texas, September 19, 1931.

Mr. E. E. Hardcastle,
Actuary.

"Policies 937853
940457
989355-6-7-8
Peter H. Williams.

Dear Sir:

"Referring to the above numbered policy,
106 we beg to thank you for your telegram of September 14th, advising that you would hold the dividends on these policies. Our attorney has just returned from West Texas where he went either to get a settlement with Mr. Williams or file suit against him with an ancillary proceeding against the Company for the dividends. After Mr. Williams had found that we were desperately in earnest about suing him for $1643.63 and fastening these dividends so he couldn't get them, he signed an order on the Company directing that all of these dividends be paid to Lee & Lee, amounting to $667.35 on the five policies which were not assigned, and $184.75 on the policy assigned to the Continental Supply Company. After giving him credit for these two amounts we took a renewal note for $914.77 due in 12 months for the balance.

"Since the premium of 1930 on the assigned policy 989355 was paid by Lee & Lee, and since the assignee paid no part of that premium but enjoyed one full year's protection by Lee & Lee's action in paying the premium, we are asking that you make this check of $184.75 payable to Lee & Lee as well as the check for $667.35. In making this request we agree to make the Company whole and safe from any damage which either the insured or the assignee might claim as a result of your paying this check to us without reference to the assignee; as a matter of fact the assignee has doubtless kissed the whole thing good-bye by not

taking care of the premium for 1931 after being advised that Mr. Williams had not done so. When you send us the check for this dividend you may send us such form of agreement you wish us to sign saving the Company from any damage for having paid it to us.

"We are also enclosing herewith Mr. Williams new note for $914.77 due on or before 12 months
107 after date, and payable to the order of Union Central Life Insurance Company, and will ask you to indorse this note making it payable to Lee & Lee without recourse on the Company, and return to us.

"We are very glad to get this matter arranged without suit. We have managed so far, to transact all of the Company's business in this Agency for 20 years with practically no suits against policyholders for notes which we have taken for premiums, and we yet hope that we may finally work out of this case and collect the 12 months note we have just taken.

"Very truly yours,
LEE & LEE, General Agents,
JEL. By (Sgd.) J. E. LEE."

EXHIBIT C.

"November 4th, 1931.

Union Central Life Insurance Co.,
Cincinnati, Ohio.
Gentlemen:

"Mr. P. H. Williams of this city died on or about October 14, 1931. We have for collection your policies issued upon the life of Mr. Williams: Nos. 937853-919313-940457-989357-989356-989355-989358.

"Please send us proof of death forms in order that we may have same executed and returned to you.

Yours very truly,
(Sgd.) CHAS. GIBBS,
CG/m. Chas. Gibbs."

108 EXHIBIT D.

"The Union Central Life Insurance Company Cincinnati, Ohio.

No. 919313—F et al, Peter H. Williams.

Mr. Charles Gibbs, Atty.
San Angelo National Bank Bldg.,
San Angelo, Texas.

Dear Sir:

"In response to your letter of Nov. 4, 1931, I regret to advise that at the death of Peter H. Williams there was no insurance in force on his life.

"Policy No. 919313 lapsed without value for failure to pay the premium due Feb. 8, 1931. Policies Nos. 937853, 940457 and 989355-6-7-8 lapsed without value for failure to pay the premium due June 10, 1931. At time of lapse the outstanding indebtedness by way of Policy advance and interest exhausted all equity.

"Since there is no liability on the part of this company, proofs of death will not be required; therefore, I am not sending blanks as requested.

"Yours very truly,
(Sgd.) J. SCHICKEL,
Manager Death Claims."

JS: JW

Nov. 12, 1931.

6.

The plaintiff introduced in evidence, and it was agreed that there was received by P. H. Williams, the defendant's dividend and premium statement, as follows:

"The Union Central Life Insurance Company Home Office, Cincinnati, Ohio.

You are hereby notified that a premium as described below will become due and be payable subject to the conditions of this notice.

109 Premium and Dividend Statement.

Amount of Premium	$ 449.10
Divident Reduction	$ 74.80
Amount due	$ 374.30

Amount of Premium $449.10.
Policy No. 940457-A.
How Payable .....
Date Due 10.
Month June, 1931.

PETER H. WILLIAMS,
Central Hotel, San Angelo,
Tex.

Please make payment before that date to The Union Central Life Ins. Co., 1127-28 Athletic Club Bldg. Dallas, Tex.

Checks and money orders should be made payable to The Union Central Life Insurance Company.

Return this notice and receipt will be sent you.

O97a3-30

(Over.)

(Reverse side.)

"Unless said premium shall be paid to the Company, or a duly appointed Agent or person authorized to collect the same on or before the day it falls due, your policy and all payments thereon will become forfeited and void except as to values provided for therein.

"To conform with the laws of certain states the above notice is given, but a cash payment of the prem-

ium without interest will be accepted at any time within thirty-one days from its due date.

"Agents are not authorized to countersign receipts, unless signed by some officer of the Company, to grant permits, make or alter contracts, waive forfeitures, or make any alterations of a renewal receipt.

"If the address on the face of this notice is not correct please indicate by writing "Over" on the face thereof, and give the correct address in the space below.

(Signed) W. HOWARD COX,
110 Secretary."

All of the foregoing statement was on the Company's printed form, the name and address of the insured and the Dallas address of the Company, the amounts of the premium and dividend, the policy number, the indication as to how the premium was payable, and the date due, being filled in on the typewriter.

It was agreed that no check was drawn on any bank by The Union Central Life Insurance Company with reference to or relating to the 1931 dividends on the said policies, for any purpose, or to any person, until September 9, 1931.

7.

MRS. NANNIE MAY WILLIAMS, plaintiff, testified in her behalf sustantially as follows:

I am the surving wife of P. H. or Peter Hardy Williams, who died October 15, 1931, at the Central Hotel in San Angelo.

At the time of his death his home was on his farm in Irion County, about 20 miles west of San Angelo. We had been living there since March 15, 1931.

Mr. Williams was sick in the spring and summer of 1931, and he was much worse from the middle of August on. About the middle of August, he and some men on the farm were branding calves, when he was kicked by a bull yearling. After that, he was never able really to work. The kick that really injured him was a kick on the abdomen just below the rib. He was also bruised from the top of his shoe—had a large bruise on his side and on his shoulder. After that, he was not confined to his bed, but he was not able to do anything; he was just up and down. He suffered so much. The next morning he had hiccups terribly bad, and from then on until a couple of days before he died. Before that kick, he had not had them.

111 Q. Were the hiccups continous or constant?

A. They were constant all the time. I don't think that unless he was under the influence of an opiate there was ten minutes of his life after the injury but that he had the hiccups. Even when he was asleep he would jerk, and when he was awake they were loud and could be heard perhaps two rooms away.

On account of the hiccups, opiates were administered to him by Dr. Nibling and Mr. McAnulty.

Q. Any other change? I direct your attention to his fever—Did he have any fever?

A. Yes, sir, he had not been well at all, all spring. I noticed him first not being very well in the winter, and he kept getting worse and worse, but he had no fever until the night this calf hurt him; and he had fever from then on until he died. I don't think he was ever clear of fever. His head hurt him. He had fever and headache, and he had the hiccups.

After the injury in August, he was not able to pursue his business or occupation at any time. His occupation was farming. He had been an oil operator, and

was still an oil operator. He was in the oil fields as a day laborer when I married him thirty years ago, and he was in the oil business most of our married life. In 1918 he bought machinery at Burkburnett, and either drilled for other people or for himself. Later, he drilled for himself a well at Big Lake and made quite a bit of money. When he sold the lease there he bought the farm. That was about four or five years ago. But he made his home in San Angelo until March, 1931. He had about 1000 acres—about half in cultivation and half in pasture; he had some live-stock.

112 I was with Mr. Williams on the farm on September 18, 1931. About that time Mr. Williams had been attended by Dr. Nibling, and by Dr. McAnulty when Dr. Nibling was not available. He went through their clinic from the 10th to the 17th of September.

Q. When he went through the clinic, did he or not have the clinic people take any X-ray picture of his teeth?

A. They took X-ray pictures of him all over, and they examined the X-rays after they had X-rayed him for his liver, his kidneys and his bladder. They had him for about a week up there X-raying him.

At the end of his examination he was advised at the clinic to have his teeth pulled. He went to Dr. Chase on the morning of September 17th and had about sixteen teeth pulled; at any rate, all the teeth he had. We got back to the hotel about 11:00 or 11:30 that morning, and stayed there until about dark. When we got back to the hotel Mr. Williams was nervous as he could be. He could not stand up and he could not sit down, and his teeth were bleeding almost in a stream; I never saw anything bleed as they bled, and he had the hiccups terribly. He would shake, and his head was hurting terribly. He was restless and he could not lie down. The noise from the street bothered

him. We had a room upstairs next to the street. About sundown we decided to go out to the farm. He thought he might rest better out there.

We got there about dark, on the night of September 17th. He didn't sleep any that night and he didn't rest a particle. He had the hiccups all night, and his teeth bled all through that night clear through the pillow, terribly.

Mrs. Webb, the lady that ran the hotel, had fixed some supper for him before we left, but he wouldn't eat.

113 That night he had high fever; I took his temperature and it was about 102, or about 101.5. I took his temperature the next morning, between 7:00 and 8:00, and it was still about what it had been, between 100 and 102.

Mr. Williams wouldn't eat anything the next morning; he didn't even sit at the table. He did not get up when I got up to fix breakfast for Mr. Jordan. Later he slipped on his clothes and went out to the toilet in the back yard, as we had no conveniences in the house. He did not tie his shoes; he just slipped on his shirt and trousers and shoes. He took some more Aspirin; he was just living on Aspirins. He left his clothes on.

About 10:30 the morning of September 18th, the morning after he had his teeth pulled, two men came out. I heard someone in the front room, the living room, and I went to the dining room door, which opens into the living room, and Mr. Williams was sitting in the chair, and two other men were sitting there. I did not take part in the conversation. I was trying to clean things up, and I had not even started dinner when the men came. I started dinner about 10:30, immediately after they came, in order to have it ready by noon. The men were still talking to Mr. Williams at noon, when Mr. Jordan, a hired man, came in for dinner. We waited dinner a little bit, and then we went

ahead and ate. He finished dinner, and had been gone about ten minutes, when those men left, about 12:30 or a little later.

The men were there, anyway, two hours. I could not repeat their conversation one sentence after another. I was in the dining room. Between it and the living room there was a place for a door, but no door, just curtains hanging on each side. I did not pay any attention to them until I heard the name "Poteet" repeated several times. I knew by repeating "Poteet" they were talking about life insurance. One
114 man would talk and then the other would talk. One would say, "It is this way, Mr. Williams," and they would talk and talk. Then Mr. Williams would say, "Well, Gentlemen, I am a sick man today; I am not able to do anything today. I will be in town in a few days and see you there." About the time he would get the sentence halfway out, the other man would start up and say: "But this is how it is, Mr. Williams"; and by that time the other man would come in. They kept that up until about 12:00 o'clock.

Q. Did you hear Mr. Williams say that he would sign or was willing to sign?

A. I didn't know there was anything concerning signing; I just heard them say those words. Every sentence he would start, he would tell them he was a sick man and was not able to talk to them.

I did not hear them talk about anything else; I didn't hear them talk about livestock or farming or anything of that kind.

The house is just a little box house, of five small rooms. The living room was 10 x 20 and it was twice as large as any other room; the rest of them were 10 x 10. September 18, 1931, was a very hot day. Everything was open. The doors between where I was preparing the meal and the room where the business transaction was taking place were open while in the dining room, whenever I listened. I could hear the con-

versation clearly. I could see Mr. Williams from where I was working. He was sitting in a big rocking chair, kinda stooped down this way part of the time, and part of the time kinda moving around. A cuspidor was at his side.

No one else was in the house. There were some Mexicans living about two blocks away.

115 A little after those men left I went in there. Mr. Williams was just slumped down in his chair like this, down and out, with his arms this way. He let me take him by the arm and help him up, but he said he did not want any dinner. I insisted that he go to the table, and I poured him some coffee, which he just tasted. I helped him to the bed in his room, where he sat down on the bed and took some Aspirins, and I slipped his shoes off and straightened him out on the bed. I put a wet towel on his forehead. I took his temperature, and it was between 102 and 103 and that scared me, and I telephoned to my son in San Angelo to bring some ice out and to take us back to the doctor.

My son come. We waited until it got cooler, and then we took Mr. Williams back to town, after sundown.

Dr. Nibling was out on a case, but we summoned Dr. McAnulty to give Mr. Williams a hypo, as Mr. Williams was hiccuping so terribly.

Mr. Williams didn't rest at all. His teeth bled almost in a stream this whole time, from the time they had been pulled out. Mr. Williams slept until about 3:00 o'clock. He waked up with the hiccups, and they were as bad as before he went to sleep. He had a high fever. His teeth were bleeding almost in a stream. I called Dr. Nibling, who knew of a nurse in the hotel, and he said to have the nurse pack some cotton hard against Mr. Williams' gums, and have Mr. Williams bite down on the cotton, and we did this. Dr. Nibling came the next morning.

From that time on Mr. Williams was a [illegible]nty sick man. We changed to Dr. Marberry about the first of October.

116 Cross Examination.

I will draw a rough floor plan of the house. I will put crosses for the doors. The house faced east, with a porch at the front and a door entering into the living room, that was 10 x 20 feet. Immediately south of the living room was the bed room where Mr. Williams was sick. Back, or west, of the living room, in the middle, was the dining room, and south of it was the kitchen, and to the north was another bedroom. A little back porch was on the south side, and at the end of the porch was a shower bath. We had no refrigerator. There was a big box on the back porch where we kept the milk.

While George Lee and Mr. Humlong were at our home that morning of the 18th of September, I spent about half of the time in the kitchen, and about half in the dining room. Mr. Williams was sitting between the door to his bedroom and the door to the dining room.

Mr. Williams did not leave the house that morning except the one time, to go to the back yard.

After Mr. Williams went to Dr. Chase, on the 17th, he took only Aspirin. The next day he just took Aspirins. No doctor came the night of the 17th. No doctor came until the night of the 18th.

After the middle of August, Mr. Williams did not bother about his corespondence. He didn't read the daily papers, though prior to August he used to read the papers. He was too sick to care.

8.

DR. R. R. CHASE, a witness for the plaintiff, testified substantially as follows:

My profession is dental surgery. Mr. Williams came to my office on the morning of September 17, 1931. I extracted fourteen teeth, all the teeth he had, at one sitting. The teeth showed several abscesses, and some ankylosis on some of the teeth, and of course considerable bone destruction. By "ankylosis" I
117 mean that the bone had grown closer and tighter to the teeth than is ordinary, making extraction difficult.

I administered block anaesthesia on the lower teeth and infiltrate anaesthesia on the upper, with the block method also injected into the angle to block the nerve. In addition to a nervous condition, which almost everyone has before having his teeth extracted, I observed that his physical condition was not good at the time.

9.

DR. G. W. NIBLING, a witness for the plaintiff, testified substantially as follows:

I am a practicing physician in San Angelo, Texas. I have been in the practice for thirty years.

I knew P. H. Williams a number of years, and I served him and his family professionally four or five years. On August 22, 1931, Mr. Williams came to my office with another patient, and he casually complained of an upset stomach, and wanted a purgative, which I gave him without a physical examination, except that I took his temperature, which was 99.2 and his pulse, which was about 90—a little fast, 70 to 74 being normal. The next time I saw him was about the 10th of September, when he came to my office. We exained his sputum and urine and gave him advice as to the care of his kidneys. The abnormal thing I found in his urine was sugar; it was plus-two.

The next day I saw him at his room in the Central Hotel. He was suffering considerably with hiccuping

and pain in his abdomen, and he took a rather heavy dose of morphine to relieve it. I saw him two or three times that day, and on the 12th of September a couple of times. He was still having hiccups and pain. His temperature was from 99 to 100, not ex-
118 cessively high. He was somewhat improved on the 12th, and he was resting and sleeping well. He was still better on the 13th, and on the 14th, on my advice, he came to the laboratory for some tests. We made another urine test and the sugar was plus-one. He had a few casts in his urine; otherwise it was negative to pathology. We also made a stomach test. He had present a few red blood cells, a few white blood cells. Lactic acid was negative. He had minus-sixteen hydrochloric acid. There was a trace of blood visible to the eye. He had a few organic salts. The X-ray of the stomach showed a horn-shaped stomach, a slow duodenal drain, which is the place where the stomach empties into the small intestine. The stomach emptied in about five hours, and got down as far as the sacrum, the beginning of the large intestine, in five or six hours. The gall bladder did not show up plain in the picture, but it showed enough pathology for me to believe that there was some serious trouble around the gall bladder or liver. We wanted to make another picture, but Mr. Williams was never able to come back. The picture of the teeth showed some pus around the roots, and it was my opinion that a lot of his absorption was coming from those bad teeth—I mean that the tissues were taking up the pus as a result of infection around the gums and teeth. I recommended that he have his teeth pulled. I think he had his teeth pulled on the 17th, and I didn't see him after the 16th for three or four days. I understood that I had been called on the evening that they came in from the ranch, after his teeth were pulled. I came in about 11:00 o'clock, and after I had been asleep—I don't know how long—I was called to the telephone. I advised them

to pack Mr. Williams' gums until he could see the dentist with reference to stopping the hemorrhage from the gums.

I saw Mr. Williams on the 20th and 21st of September. He was nervous and more or less unstrung. He was spitting blood and sitting on the edge of the bed, and had a bucket by the bed where he could
119 expectorate. He wouldn't lie down. As he was holding ice in his mouth, trying to stop the hemorrhage, I didn't take his temperature. That was on the 21st. I only tried to make him comfortable with respect to the pain. I think I gave him a hypodermic of one-fourth of a grain of morphine, and that was the last time I saw him.

At the time he went through the clinic, my conclusion from the clinical report was that Mr. Williams had trouble with his liver and gall badder, either malignant or serious, and it could have been cirrhosis of the liver or cancer of the liver, I didn't definitely determine which.

Q. Dr. Nibling, what, if any, reaction would you expect, as a professional man, from the extraction of the teeth in the condition that the clinical report indicated Mr. Williams' teeth to be in at that time?

A. You mean on his nervous system, the intellect, or physical?

Q. Intellect or nervous system or any way.

A. Why it would cause a general upset of the whole mechanism in my opinion. You know when you have a tooth pulled it is rather a serious thing and is very painful and he had a number of teeth pulled. And then again, he lost quite a lot of blood evidently, because he was spitting blood three days after the teeth were pulled.

Q. Now, would the presence of pus at the roots of his teeth have anything to do to aggravate the condition?

A. Yes, sir, in this way: The breaking down of the little barrier between the pus sac and the gums would cause a more rapid, free absorption of the pus germ.

120 Absorption means the taking up of the poison into the system more rapidly. That produces fever and sometimes a chill, and the pus is supposed to be scattered over the body through the blood stream. The poison suddenly pouring into the blood produces the fever or chill. The pulling of the teeth probably caused the disturbance, though he was getting some absorption already. To get rid of the absorption, we advised that his teeth should be pulled, and in the pulling of the teeth evidently some of the little sacs that hold the pus were ruptured, and that allowed the pus to be absorbed through the gums.

Q. Would this absorption affect or react upon the brain or mind in any manner, or the nervous system?

A. Well, in a way I believe it would. I cannot state definitely how, except that a poisonous condition just upsets the mental equilibrium.

Cross Examination.

The only days on which we had X-rays made were on the 13th and 14th of September. It takes two days to make a gall bladder picture. On the 16th the examination was finished, and I recommended that Mr. Williams go to a dentist. The call on the 16th was short. A short conversation was carried on about the teeth. Mr. Williams talked rationally at the time.

Q. Did you observe anything abnormal about his mind at that time?

A. Not in particular.

Q. Did you observe anything abnormal about his mind the day before that, or the day before that?

A. No, sir. Nothing abnormal that you could put your finger on. He talked sensibly.

121 Q. Do you remember any topic of conversation carried on between the two of you?

A. No, sir, I don't know, other than his ailments—his condition.

Q. As far as you knew, he was mentally sound at the time you examined him?

A. At that time, yes, sir.

Q. And at all other times that you examined him?

A. Yes, sir, that is right.

Q. Was he mentally sound on the 20th and 21st of September?

A. He was a sick man, but he appeared to be in his right mind.

Q. He was suffering pain, but you noticed nothing the matter with his mind on any of those days?

A. No, sir, I did not.

10.

DR. A. J. MARBERRY, a witness for the Plaintiff, testified substantially as follows:

I have lived in San Angelo about thirty years. I have been practicing medicine since 1881. I treated P. H. Williams professionally about the last of September, 1931, and attended him up until the time of his death. The cause of his death, in my opinion, was cirrhosis of the liver and abdominal dropsy or ascites. In the usual case of cirrhosis of the liver the disease is very slow and long-continued, some of them lasting many years. In most cases there is enlargement in the beginning and shrinkage later. Where cirrhosis runs a normal course, there would not be much reaction upon the mind or brain, but where there is a good deal of infection or ascites, shortness of the breath
122 and weakness of the heart, there would be a reaction on the mind as well as on the body. The patient would be feeble all over.

By "Ascites" is meant an accumulation of water in the abdomen. I tested Mr. Williams three times for water, and on the first time I drew off about two gallons, and almost that much the other times. The water accumulated very rapidly, more so than I have ever seen.

An injury inflicted to the right side in the region of the liver I think would aggravate the ascities condition. In this particular case, the fluid accumulated probably was caused by an injury to the blood vessels, a plugging of the veins. The blood, being dammed back, could not get through the liver back to the heart. It would be like pumping water into a bag that would let the water leak out. That same thing takes place in the blood vessels. They are distended or strutted. The heart pumps the blood into the spleen, intestines and all those things. The arteries pump it in and the veins carry it back. From the abdominal cavity it has to return to the heart through the liver. If it cannot go back as fast as it is pumped in, there is a distention of the vessel that causes a hemorrhage from the stomach, bowels, etc.

The liver is the organ that principally burns up or destroys the poisons of the system, of the blood; it purifies the blood as one of its functions. In Mr. Williams' case, the liver was exceedingly small. Normally it would weigh three or four pounds, but his liver would have weighed probably two pounds. This would indicate that the glandular substance of the liver had been destroyed and replaced by a fibrous tissue that has no function; it is the glands in the liver that purify the blood.

123 Q. Now, the condition of the liver, does it have anything to do—Does this ascites condition or general condition that you found Mr. Williams to be in—Would you say that condition would have any reaction or operate upon his mind or mental capacity?

A. Well, you might say indirectly.

Q. In what way?

A. In the first place, the extreme distention of the abdomen and the rendering of the breath very shallow, and he was very short of breath, panting for breath—that would be one thing; and it would weaken the heart. The blood being dammed back, the heart forcing the blood in trying to get it around—it would overpower the heart, the heart would become weakened, depending upon the nature of the case, the amount of fluid accumulated, etc.

Q. Would that condition in your opinion be reflected in his mental state in any way?

A. Indirectly. As the liver cannot purify the blood, the blood becomes toxic or poisoned. That would of course react, and cause, in some cases, a little fever; in other cases a muddy, ugly condition of the skin. Of course, toxic conditions would always affect the general system as well as the mind. The history of the case showed that he had infected teeth. That, of course, would poison the blood, and the liver would be unable to destroy those poisons. Then, again he had no acid on the stomach; the stomach glands were destroyed, and there was soapy mucus, showing an inflammatory condition of the stomach. The stomach secretes hydrochloric acid, which acts as an antiseptic to destroy the intestinal poisons. Then there
124 are poisonous materials in the stomach that are absorbed from the stomach and from the duodenal and the intestines.

Poisons or toxins accumulate, and the liver is not able to destroy them. A toxic and weakened condition results—a weak heart, weak respiration, shallow breathing. All of these things taken together, with the toxic condition, would of course enfeeble the whole system. He was extremely feeble, barely able to walk at all—not only feebly in body, but all the way round. You would not call it insanity, but a feeble, incompetent condition, you might say. The body was of course feeble, too, very, very feeble.

Cross Examination.

I made no X-rays. When I first saw Mr. Williams there wasn't anything to do except draw the fluid as a palliative measure. He was in a manner dead. After the fluid was drawn off, about the only change was that he would breath a little better. Yes, this disease of the liver is one of long, slow development. Before it reaches an acute stage when you have to tap a man, his condition of course varies, and he has his ups and downs; that is true of every disease.

11.

JEFF JORDAN, a witness for the plaintiff, testified substantially as follows:

I had known Mr. Williams all his life; we were raised together. The last few years of his life I worked for him out on his ranch. I did general farm and ranch work; I was a laborer. For a few months before Mr. Williams' death I lived in the house with him
125 and his family.

I recall the occasion when Mr. Williams, Jim Mabry and I were bull-branding. Mr. Williams was putting the brand on the bull's left hip, when the bull kicked and jerked loose and kicked Mr. Williams in the stomach and knocked him down. The bull pranced around and kicked him. Mr. Williams was knocked breathless. In a few minutes he caught his breath and said, "Well, I am all right." We had about three or four more to brand, and Mr. Williams watched us and then went into the house. About half an hour later he came out and drove away.

I worked for Mr. Williams from February, 1929, until June, 1930. I commenced working for him

again in April, 1931, and was still working for him when he died. I was working on the ranch during September, 1931.

I recall that Mr. Williams had his teeth pulled out. I was working on the farm and staying there in the house with Mr. Williams at the time. Mr. and Mrs. Williams came out on the evening of the day he had his teeth pulled.

I recall that two men came to see Mr. Williams the next day on some business matter.

I was in the field at work until 11:30 that morning. I got down to the house about 12 o'clock. Mrs. Williams and I waited a while, and then we ate dinner. I was sitting where I could see Mr. Williams all of the time, but I couldn't see the other two men. They were talking to him about signing some papers. I heard him tell them two or three times no that he wouldn't do it; that he was not in good shape to sign papers; that he was too sick. He would get up once in a while and walk a step or two and spit and come back and sit down. Sometimes he would be sitting up straight, and then again he would be leaning over, this way.

126 I was at the house at noon about forty or forty-five minutes, and they were still there when I left.

I had a watch, and I always quit work at about 11:30, so that I could get to the house by 12 o'clock or a little before.

Mr. Williams had not given his consent to signing the papers when I left.

Before leaving for work that morning I seen Mr. Williams. He was sitting on the side of the bed, and I asked him how he felt. The night before, I slept in my room, next to the dining room. You could get to Mr. Williams' room by going through the dining room and kitchen. I was awake several times in the middle of the night, and I could hear him groaning and taking on. That day the men were there—when I got back from work in the evening, Mr. Williams was still at

home. He was lying on the bed when I came in. But about 8 o'clock, or maybe 9 o'clock, his son took him to town.

Mr. Williams didn't do much work on the farm as a farm hand. He was just generally always around over the farm telling us what to do.

After the bull injury, I noticed a good deal of change in Mr. Williams. He didn't seem like himself. He would be sitting around and studying a right smart. Maybe I would say something to him, and it would be several minutes before he would answer. Lots of times he would tell me to do a piece of work, and then I would start to do it, and he would want to know what I was going to do that for; and when I would tell him that he had told me to do it, he would say that was all right, to go ahead. Sometimes he would
127 get on me pretty hard. Sometimes I would be plowing and he would want to know if I had gotten through a certain piece of land, and when I would tell him no, he would want to know what was the matter with me. There wasn't a man that could do it in that time. If I couldn't plow a block of 25 to 35 acres in a half a day or a day, he would get on me.

I noticed when I was counting cattle, he and I would count them out the same, and maybe 15 or 20 minutes later he wanted to know how many we had counted; he had forgotten. I would tell him, and it seemed like he would take my count.

Before all this happened, he was active, willing to help. But after this, it seemed like he didn't care whether he helped or not. He didn't do any work after the injury.

Cross Examination.

Mr. Williams would work whenever there was anything necessary for him to do. When there was an extra amount of work sometimes he would work and

sometimes he wouldn't. In ordinary times, when we were not carrying on some special form of work, I would be able to take care of the work with the Mexicans on the farm, and all Mr. Williams did was to give us directions now and then.

Two or three times I heard something about signing papers, or Mr. Williams' saying he didn't want to sign some papers. I was sitting at the table when I heard that. Mrs. Williams was at the table, too. I suppose that she could have heard anything I heard then.

I have related all of the conversation I heard between Mr. Williams and the two men in the front room.

128 12.

H. G. WHITTAKER, a witness for the plaintiff, testified substantially as follows:

I have lived in San Angelo a little over four years. I am in the implement and feed business. When I first knew Mr. Williams he was a very strong, healthy man, but the latter part of his life he was very much changed. For a good while before he died he was a different man altogether. The crisis came about the time when he had the failure in the oil well. That was about eight or ten months ago,—something like that,—the best I remember. Before he got down in such a bad shape, he was very vigorous, stout and hardy, and he walked square and upright and was an awfully strong-minded fellow. After this he was just the opposite. He went all stooped over. He was not himself physically. I don't know when it was he went to pieces; it was sometime last year. It was in the fall of last year, if I remember right.

13.

MRS. P. J. WEBB, a witness for the plaintiff, testified substantially as follows:

I live at the Central Hotel in San Angelo. I am the proprietress, and have been almost seven years.

I was acquainted with P. H. Williams during his lifetime. I knew him fully five and a half years. Soon after I commenced running the hotel he and his wife stayed there for about two years and a half.

I recall Mr. Williams' accident at his farm during August, 1931. I first saw him when he came to the hotel, possibly a week afterward, and asked if I had
129 a room where he might lie down for a short time and rest; that he felt bad. He stayed until late in the evening, until it was cooler, before he went back to his farm. It was a Saturday afternoon—I think it was August 22d. He had been to see a doctor and had some medicine that he took after he got to the hotel. He complained of a headache and a hurting in his side, and I bathed his face with a towel and ice water. His temperature was very high, around 104. I had been a practical nurse. He was back again on the following Monday. At that time he went to his daughter-in-law's room and lay down the biggest part of the day. For the next several days he was very sick, and someone would drive him back to the farm in the evening and bring him in the next day. He came in almost every day until about September 11th, when he registered for a room. He was coming in to see the doctor a part of the time, going to the clinic. One day he had the doctor up to the hotel before he took a room. He was hiccuping and had the doctor to get some relief.

I remember that he had his teeth extracted on the morning of the 17th of September. After going to Dr. Chase's office and having all of them extracted, he

came back awfully nervous and sick, and went to his room and lay down, but not until after he had rested at the head of the stairs a while. He was up and down. His gums were bleeding terribly and he had to sit up most of the time, on account of so much blood coming from his mouth. About sundown he went out to the farm.

I saw him the next evening, late, between sundown and dark. When he came in, his gums were bleeding terribly and he was exhausted and sick. We got him in his room as soon as he was able to go there, and called for a doctor. Dr. Nibling was out, and Dr. McAnulty came, about eleven o'clock, gave Mr. Williams
130 a hypo and tried to check the excessive bleeding of the gums. About thirty or forty minutes later Mr. Williams dropped off to sleep a little bit. Then he waked up again, and his mouth was so filled with blood he began spitting up blood. That frightened his wife, and we tried to get a doctor again; it must have been around 2 o'clock in the morning. He said to have the nurse in the house on another case pack his gums, and the nurse took some cotton and packed them and tried to stop the bleeding. Mr. Williams did not leave the hotel any more after that, and he died at the hotel.

When I first knew Mr. Williams he was a very active man, brimful of energy. He was so full of energy that he went day and night at times. He was in the oil business. I noticed a change or difference in Mr. Williams several times, about July and August, especially throughout the month of August I could tell that he was failing. He looked weaker, and didn't have the strength to do as he had done before.

While Mr. Williams was at the hotel, so sick, he did things I had never seen him do before. I would try to give him the medicine and he would just refuse to take it; he would spit the medicine right into my face. And on one occasion he grabbed me by the arm and clinched it and stuck his nails into my flesh until

it brought blood, and he had never done anything like that before. That was, I should judge, about eight or ten days before his death. I don't recall any other incident showing a change in Mr. Williams.

14.

JIM MABRY, a witness for the plaintiff, testified substantially as follows:

131 I lived on P. H. Williams' farm during 1931, up until September 3d. I had known Mr. Williams about eight years. I worked for him about two years altogether, doing farm and ranch work. Prior to 1931 Mr. Williams was a vigorous, robust man, had a jolly disposition and was an agreeable man to work for. He was a man of ordinary intelligence. I was working on the farm in August, 1931, at the time of the branding of the cattle and Mr. Williams' injury. A yearling we were branding broke loose from us and kicked Mr. Williams in the stomach, and Mr. Williams fell back on the ground. It looked then like the calf was stamping on Mr. Williams—pretty well all over the lower part of his body. In a day or two Mr. Williams lifted up his trousers and showed me bruises on his body from his hips down to his shoes. The skin was not busted, but I called it grained. I never saw his stomach or side.

After I left Mr. Williams on the 3d day of September, I saw him once, close to the Central Hotel. At that time Mr. Williams looked awful bad, like he had been sick a long time. He was all in, down and out. That must have been about the first of October.

I noticed a change in Mr. Williams' actions and conduct during the spring and summer of 1931. One change was very noticeable in the way he counted the stock and gave orders. In counting the stock, he would

invariably find some brute missing that would not actually be missing. He couldn't count a bunch of stock property. Then he would repeat the orders that he would give about farm work, and would gives orders that were impossible of performance. For instance, he would tell me to plow a certain piece of land that probably would take two or three days, and
132 he would tell me to do it in one day. Then he would have two or three other jobs laid out to be done the same day. Any one order would probably consume two or three days' work. Also, he would have the irrigating ditch cleaned out in the middle and leave both ends of the ditch dirty, and then try to force water down through the ditch.

He would come out to the field in his car, and in place of getting out, like he usually did, he would lean on the steering wheel and apparently go to sleep, or be in a dazed condition. Sometime he would do that ten minutes or a half hour. He did that frequently. One Sunday morning, after he had done that for about thirty minutes, I went over and shook him. I don't remember other particular occasions, but it was often that I did that. The first time I noticed him being so bad about going to sleep was along in June, 1931, before harvest time. That was before the bull hurt him. It seemed like he was getting weaker and going down physically.

After the injury from the bull, he walked with a slight stoop, and invariably held his hands on his stomach. He was walking that way when he would get around where I was working; I never seen him get entirely over it.

Mr. Williams did not do any kind of work after August 16th, to my knowledge. If he had done any amount of work before I left on the 3d of September, I would have known of it. In the summer or spring of 1931 Mr. Williams talked to me about his business in a general way. He said he was broke and there was not any chance of recovery without something turned up.

After the bull accident, Mr. Williams' breath was awfully short panting; and he would hiccup at times considerably, panting when he would try to talk. I never noticed that condition until after the
133 injury. I think I noticed it a week or ten days afterward, and he never recovered from that condition that I know of.

Cross Examination.

Before the accident Mr. Williams sometimes drove a tractor. On special occasions he rode in the pasture with me or some of the rest of the boys. Where we needed an extra man he would make a hand, but he was not a regular hand; he just helped on special occasions.

I got my orders from Mr. Williams up until the time I left on September 3d.

15.

GEORGE J. BAILEY, a witness for the plaintiff, testified substantially as follows:

I have lived in San Angelo about twenty years, and have been in the garage business about eight years. P. H. Williams was a customer of mine. He loafed around my place when he first came to San Angelo. I noticed the change in Mr. Williams in the spring or summer of 1931. One change was I didn't see him as much as I used to. Another thing that impressed me was some statements he made one afternoon when he came to see me about a bill he owned me. They may have been doing tire work on his car in the garage. I happened to come up and he spoke to me and said "George, you have been awfully good to me. I owe you some money and I do not know how I am going to

pay you." I said, "Well, I guess there will be a better time coming; maybe things won't be this way all the time." He looked pretty nervous and out of
134 sorts. He said "well, there is only one way I can do it. It is the only way I can see. I just believe I am going to do it. He was sitting there puffing and blowing, and kinda looked like he meant it. I said, "P. H., I don't need the money that bad. I don't expect any of my friends to pay me that way." He said he had a lot of insurance. He had spoken of that, and said it was the only way he could do it. I just pulled him off of the subject of paying this bill.

He said that if he didn't hit oil or something out there I don't remember what it was He said something about going night and day, and that he had this farm up there, and he was nervous about it. I said, "you have been up too much. You ought to go and get some rest". And he said "Well, I can't, I have so much to do."

He said he was not able to pay his bills, that he had some wheat out there, and to give me protection on that, he would give me a mortgage. I told him all right, and he said, "I am going to the farm and see how much I have got out there, and I will be back in and give you the mortgage on the wheat." He never did do that; he never did come back. He never did pay his account.

Cross Examination.

I don't recall the date of the conversation about his inability to pay the bill. It was possibly some month or six weeks before the afternoon I heard he was sick at the hotel. I don't remember what month he died in, but the conversation must have been around four to six weeks before his death. I intended to go out to his place to see about the wheat, but I didn't go, and then I heard he was at the hotel, sick. I had not been with

him much up until the time of the conversation. He still owes me around $1,000.

135

16.

A. E. HENDERSON, a witness for the plaintiff, testified substantially as follows:

I have been an oil well driller for about eighteen years. I met P. H. Williams for the first time in 1928. I worked for him almost continuously from August, 1929, until about the first of March, 1931. I drilled for Mr. Williams, as the owner, a well near Barnhart, Texas, called the Ash No. 1, which was drilled to a depth of 8900 feet, was a dry hole and must have cost about 150,000.

Several days before we quit work on that well Mr. Williams seemed to realize that the well was condemned. He had had lots of hopes for production and he seemed very despondent. About a couple of days before we finished he came out to the rig while I was on the tower on duty. When he came in he hardly spoke to me. He walked back and forth across the rig and looked very much worried. I spoke to him and asked him what was the matter, and it seemed he hardly heard me; he looked at me and stared blankly. I went over where he was, took him by the arm, and asked him if he didn't feel good. He said that he didn't know what he was going to do if the well was dry; that it had cost him so much; that he believed he would just get out his gun and let the insurance company pay his debts. He didn't do this. I tried to cheer him up, and talked about something else. He seemed to forget his trouble temporarily.

Later I plugged the well, in September, 1930, and then I went to Upton County and drilled two wells

for Mr. Williams. They were dryholes, also.
136 They would each cost about $20,000. The first one was completed in December, and I left Mr. Williams' employment in February, 1931, before completion of the second one.

I noticed a change in the condition and physical appearance of Mr. Williams after completion of the deep hole. He seemed to age fast, and I noticed a change in his outlook on life. He didn't seem to be as patient as formerly. He would find fault with little things that he used to overlook. He would pick flaws where there really was not any, and he was hard to get along with. Prior to that time he was not hard to work for. When I was working on the deep well I thought he was the finest man I had ever worked for.

I didn't notice a marked change until after he had completed his first well in Upton County. When we started the second well in Upton County he came out and decided that the countershaft and engine were not lined up, and insisted that the engine be moved, when it was really the countershaft. He left, and we moved the countershaft and didn't move the engine. He came out a few days later and noticed that the engine had not been moved, and immediately demanded that the engine be moved. I insisted it was all right, and childish-like, he gave up and drove away. When I was off duty, he came back and had the boys on duty shift the engine around, and finally wound up by leaving it where it was. Several days later the reverse belt jumped off. It had gotten too loose; and Mr. Williams got a new belt and left it in the car until I was not on duty, and then he had them put the new belt on.

In the summer and fall of 1931, I saw Mr. Williams quite frequently in San Angelo. He appeared to be very much broken in spirit and health, and seemed to go bent over down the street, absorbed in himself, without noticing anyone much. He would not speak to me, even though I always spoke to him. I have seen him

137 drive up to the curb in his car and just sit, slumped over the wheel, with his arm on the wheel for as much as forty-five minutes at a time. One day—it might have been July or the first part of August—I was standing on a corner downtown and he drove up across the street and parked by the bank. He just slumped over the wheel, with his arm over it, for as long as forty-five minutes. When I walked away he was still sitting there, and didn't appear to notice anyone. No one came to talk to him.

Cross Examination.

I left Mr. Williams' employ in February, 1931, because he fired me. We had differences for possibly a month during the time the second well was drilled in Upton County. I had no conversation with Mr. Williams after February, 1931. He does not owe me any money.

There was an incident that led up to his firing me. I lived about a block from the hotel in Rankin, and my tool dresser stayed at the hotel. Mr. Williams had a habit of calling up about 7 or 8 o'clock in the morning to inquire how deep we were at midnight on the well when we left. This morning the tool dresser was away, and when Mr. Williams could not locate him, he sent for me, and I refused to go to the telephone at that time, because it was physically impossible to get up much earlier than 9 or 9:30 and get the required amount of rest.

The 15th of May, 1930, was the last day that was drilled on the deep well near Barnhart. The conversation about the gun took place two or three days before that.

138 Re-Direct Examination.

At the time that Mr. Williams discharged me I had a near altercation with him. He gave me a check

which was not in full, and I objected to accepting the check. He insisted I would have to wait until he came back to San Angelo before I could get the rest. I demanded a reason why he would not give me a check in full then. That was about all that was said, and he drove away. Later, he drove up beside my car in San Angelo, and I got out and went around to his car, put my foot on the running board and my elbow in the window. I asked him if he had decided to give me the check, and he said no. I remarked that I guessed I would be forced to shut his rig down until I got my money. With that he struck me on the chin, and he began to scramble for the door-latch or his gun. I knew he frequently carried a gun in the car pocket, and I started edging around behind the car. I was very much surprised at his striking me. I felt sorry for him.

17.

GROVER C. PARRISH, a witness for the plaintiff, testified substantially as follows:

I am an oil well driller, and have known Mr. P. H. Williams since about 1926. Prior to the spring or summer of 1931 he seemed to be very energetic. You could notice a change in Mr. Williams from about 1931, along in there when he finished his deep well and lost his money. He seemed to age and get downcast.

I visited him twice when he was at the hotel sick, and I would see him often in town before then. During the summer of 1931 he seemed down and out and would not have much to say to anybody.

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18.

JOE STOCKS, a witness for the plaintiff, testified substantially as follows:

I have lived in Irion County for 16 years. I have been in the sheep business.

I knew P. H. Williams about five years. When I first met him he was an active business man. He was about 5 feet 8 or 9 inches tall, weighed 170 or 180 pounds and appeared to be 50 to 60 years old. He appeared strong and healthy.

I noticed a change in Mr. Williams along in the summer of 1931. He was bothered and worried about business and he was irritable. He had a difficulty with a boy on his place and the boy struck him over the head with an automobile crank.

Our places joined, and we had business transactions. On one occasion he asked me if I would pasture some cattle for him, and I told him I would, and held the pasture for 30 or 40 days. Then I told him I had been holding it, and he said he had forgotten that he had promised to take the pasture. Then he wanted to exchange some grain for the grass in my pasture, and we agreed on the price. He weighed me out 400 bushels of grain that I had hauled over to my place. When we went to settle, he had me charged with only 200 bushels, and in the settlement I paid for 200 bushels of oats that he didn't have me charged with.

Cross Examination.

I made the agreement with Williams about pasturing cattle about the first of June, 1931. The transaction about weighing 400 bushels must have been from 10 to 30 days later.

140 19.

L. O. SHUDDE, a witness for the plaintiff, testified substantially as follows:

I live in Dallas, Texas, and am an actuary for a life insurance company there. I have been an actuary for 15 years. I am a Fellow of the American Institute of Actuaries.

Q. Mr. Shudde, I hand you here Union Central Life Insurance Company policy No. 940457, on the life of Peter Hardy Williams, dated July 26, 1927. You have had an opportunity to examine that before, have you not?

A. Yes, sir.

Thereupon, for the purpose of saving the time involved in the witness' making mathematical calculations and testifying thereto, it was agreed that $74.80 is sufficient in amount, if applied in reduction of the indebtedness against the policy, or if applied to the purchase of extended insurance, to purchase extended insurance for a period beyond the date of the death of P. H. Williams; that the surrender value of the policy, if increased by $74.80 at the time of its lapse, becomes sufficient in amount to purchase extended insurance for a period expiring after the date of the death of P. H. Williams; the amount of such extended insurance being the amount of the policy less the indebtedness, including in the deduction, in addition to principal, interest thereon for one year, up to June 10, 1931. By this stipulation, it is not intended that the plaintiff admits that the 1931 dividend of $74.80 was not applied in reduction of the indebtedness against the policy or to the purchase of extended insurance or to increase the cash value of the policy, nor is it intended that the defendant admits that the dividend was applied in any of the ways mentioned.

141 20.

DR. F. S. WHITE, a witness for the plaintiff, testified substantially as follows:

As to what schools of medicine I am a graduate of, I graduated first from the Central College of Physicians and Surgeons at Indianapolis (now merged with

the University of Indiana), and since then I have taken several post-graduate courses in New York. I have been practicing medicine since 1884, being in the general practice ten or twelve years, and since then, for at least 25 years I have been specializing in nervous and mental diseases. I have been superintendent of all of the hospitals of the insane in Texas, except the one at Rusk. My official connection lasted 15 or 20 years. Then I operated a private sanitarium at Wichita Falls for nervous and mental diseases. I am engaged in private work at San Antonio now. The state asylums or hospitals I was connected with were at Terrell, Austin, San Antonio and Wichita Falls.

Q. Now, Doctor, please answer the question that I am about to propound to you, basing your answer thereto upon the following assumed state of facts: For several years prior to the year 1931, P. H. Williams was engaged upon a large scale in the oil business, including the drilling of wells. He was active and energetic. He was, generally speaking, of a sociable disposition, and even temperament. Prior to the year 1931 he suffered heavy financial losses, and became despondent, and on at least one occasion he became so morose as to talk of suicide. In the spring and early summer of 1931 there was noticeable to some of those coming in contact with him, some lapse or loss of memory, relating to recent events. During that portion of the year 1931, prior to August 16, 1931, which is the date of the accident, that will be here-
142 inafter mentioned, he managed his farm in Irion County, Texas. He at times did work, as driving a tractor, handling cattle and general work about the farm. Prior to August 16th, 1931, he have some signs of occasional indisposition, apparent to his wife, but was able to, and did work, involving physical labor occasionally, as herein above indicated. On or about August 16, 1931, while branding a bull yearing,

he was kicked in the abdomen by that yearling, with such force as to knock him down. Thereafter, he did not do any work on the farm involving any material or appreciable physical exertion. He did give directions to the farm hands as to the work, but he was not able to bear in his memory from one day to another the directions so given. This being noticeable on a number of occasions; after the said accident, he complained of discomfort, and at times pain in the abdomen. When walking he stooped, and at times was observed holding his hands to his abdomen and side. He became short of breath; at any appreciable exertion he would gasp for breath. Hiccups and headaches developed shortly after the accident and continued intermittently until the time of his death. The hiccups continued to a few days before his death, when he suffered a hemorrhage, after which hemorrhage he did not have hiccups. Both shortly prior to the accident, and after the accident, he was observed, on several occasions, sitting in his car, stooped and bowed over the steering wheel, with his head downcast, being and remaining in such position for periods of from 30 to 45 minutes, manifesting on said occasion no interest whatsoever in his surroundings. In the latter part of August and early part of September, 1931, he went through clinical examinations, including laboratory urinalysis and X-rays, at the San Angelo Medical and Surgical clinics. Abnormalities were evidenced by casts, and some
143 sugar was observed in the urinalysis, but not so as to definitely indicate the cause of his trouble. No positive or definite diagnosis was made by the physicians at the clinic, but the X-rays and other findings suggested to the examining physicians and indicated to them that he had a serious disorder, involving the liver and perhaps the gall bladder—in their opinion either a condition of malignancy or cirrhosis. No condition of ascites or dropsy was noted during the period of said examinations, which extended until

about the middle of September, 1931. X-rays made of the teeth during said examination disclosed pus pockets in several teeth, and on September 17, 1931, in the morning of said day, all of his teeth, some fourteen in number, were extracted. A local anaesthetic, with the dental blocking technique, was used. The operating dentist noticed that several teeth had pus pockets at the roots, and further noted a condition of ankylosis, in bone tissue, and a deterioration of bone tissue. In the afternoon of said day of September 17, 1931, the said P. H. Williams went from San Angelo, where the dental operation had been performed, to his ranch or farm in Irion County, Texas, a distance of some 20 miles, being taken there in a car. Upon his arrival there he went to bed, and spent a restless and practically sleepless night, his gums bleeding all during the night, and practically throughout the night, his condition of restlessness being such that his groaning was noticeable to a farm hand sleeping in the next room to the room joining the one in which Mr. Williams was sleeping—noticeable at times during the night. On the morning of September 18, 1931, the said P. H. Williams did not eat any breakfast. He appeared to be to those at the place, and so stated to them, weak and sick. His gums continued to bleed intermittently dur-
144 ing the early morning of said date of September 18th. During the preceding night he had had fever. He had some fever during the early morning of September 18th. He had fever in the afternoon of September 18th, a little higher than it had been early in the morning, the fever in the morning being 2 degrees, or thereabouts, above normal, and in the afternoon being some thing like 2 degrees above that in the morning. He did not eat any dinner. He was in bed most of the early part of the morning of September 18th, and sat up during part of the morning of September 18th, in a chair in the room joining the bedroom. In the afternoon of September 18th he grew weaker. He had been given Aspirin while at his house

to relieve his suffering and discomfort. In the afternoon or early in the evening or night of September 18th he became,—to those surrounding him, to his wife,—so weak and his gums bleeding so much that she returned with him to San Angelo, to the Central Hotel, arriving there in the night of September 18th. He remained in the Central Hotel from September 18th to the date of his death. From the night of September 18th until the date of his death, his death occuring on October 15, 1931,—he was not, during all of that period, in bed; part of the time he was in bed, and part of the time he would sit upon the bed. At times between September 18th and the date of his death,—for a few days after September 18th,—his gums bled so much he had hemorrhages, and physicians had to be called, and morphine administered. On the night of September 18th he was again restless and sleepless. These hiccups were almost constant, with few intermittent periods between September 18, 1931, and the date of the hemorrhage, which preceded his death by only a few days. He complained during this period, between September 18th and the date of his death, of discomfort and pain in his abdomen, shortness of breath,
being troubled so much that he had to be
145 propped up and had to sit up in bed with a
pillow behind him instead of lying down. Now, he was able to go to see a doctor on or about September 30, 1931, able to walk to his office, to the doctor's office, that doctor being Dr. Marberry. Dr. Marberry found, upon examination, when P. H. Williams first came to him in the latter part of September or at the last of September, a market condition of ascites or dropsy, and found by manipulation and examination that the liver was abnormally small. His diagnosis was cirrhosis of the liver. The prognosis was very unfavorable, he stating that he saw that nothing could be done to save him. The only thing that he undertook to do was to try to alleviate, to some extent, the discomfort produced by this dropsy,—alleviating

that by injecting a needle in the abdomen and drawing off the fluid on several occasions, the amount of fluid running as high as two gallons. Dr. Marberry treated him once, perhaps twice, at the office. He went to see Mr. Williams at the hotel also, and performed this operation to alleviate his discomfort from the ascites. He said that no appreciable relief was obtained. Those who observed P. H. Williams noticed changes in him, physically and otherwise, and some noticed them at one time and some at another time, some placing the date early in the year 1931, some in the summer of 1931, some before, and some after the date of the accident in August, 1931. Dr. Nibling, one of the physicians in the clinic, noted that Williams was suffering from a serious disorder such a disorder as to result in a toxic condition calculated and likely to influence or affect his nervous system and his mental powers; but Dr. Nibling stated that he did not observe unsoundness of mine. Those who were in contact with P. H. Williams and closely associated with him, ob-
146 served marked change, both as to his physical condition and as to his mental condition, as hereinabove outlined, and as to his personality, and as to his characteristics; and these changes had been observed and noted prior to September 18, 1931.

Q. Now, Doctor, basing your answer upon said assumed state of facts, please state whether or not in your opinion P. H. Williams, on September 18, 1931, had the mental power and capacity to weigh and understand and consider the nature and effect of a business transaction, assuming that all of those facts are true.

Mr. Randolph:

We object to the question on the ground that the sum total of the evidence introduced is insufficient to form any basis for the framing of the hypothetical ques-

tion to an alienist as to whether P. H. Williams was of a sufficient mental power and capacity to weigh and understand a transaction, or any transaction. We also object to the question on the ground that, taken as a whole, it is too vague and indefinite in details to form any basis for the rendering of an opinion by an alienist, and that also, taken as a whole, there is no basis in the testimony for the assumption of facts states to the witness, we further object to the question on the ground that the statement therein as to Mr. Williams' having suffered some loss or lapse of memory relative to recent events is objectionable on the ground that there is no specification of the things not remembered, of the surrounding circumstances, or the dates of such matters. We further object on the ground that the reference to some signs of occasional indisposition, apparent to his wife, is too vague to form any basis for an opinion on the part of an alienist. Also we object to the
147 assumption that there was material or appreciable physical exertion at some vague and indefinite time; that there was no material or appreciable exertion after the accident, as being vague and indefinite. We also object to the assumption that Williams was not able to bear in his memory, from one day to another, directions that he gave to the people on the farm, on the ground that there is no evidence in the record for such assumption, and that it is also vague and indefinite; also to the assumption that at times Williams was holding his hands to his side, as being likewise vague and indefinite; we also object to the assumption that on several occasions Williams was observed sitting in his car, drooped and downcast, or words of similar import, as being too vague and indefinite to form the basis for forming an opinion; also to the assumption that Williams, after he came to San Angelo to consult doctors, was part of the time in bed and part of the time not, as being likewise too vague and indefinite; also the assumption that the shortening of breath—that Williams' shortening of breath was

so much at times that he had to sit up as being likewise too vague and indefinite. We also object to the assumption that witnesses had testified to noticing a change in condition, or to a marked change of condition, as to physical and mental condition, as not actually informing the alienist as to what the changes were, and it being likewise too vague and indefinite to enable the alienist to form any opinion, and being in other respects, too numerous to mention, too vague and indefinite, and in other respects having no basis in the testimony for the facts assumed.

148 The Court:

Well, the objection that the question is too vague and indefinite to permit one to form an opinion upon is a matter that goes to the weight of it, I think. The Court recognizes some of the objections as to the accuracy or alleged accuracy of the question, no testimony that he had to be propped up in bed awhile and at other times lying down. Is there any suggestion of any such testimony as that?

Mr. Williams:

Then we withdraw that feature of it; if that is the Court's recollection, we withdraw that portion of the question.

The Court:

The question, to the Court's mind as to the last part of it I am not sure about that; it is not included in the objection. That is assuming those statements to be facts, whether such a person had the mental power and capacity to understand a business transaction. The objection is made. I over-rule it, and leave it to the jury to go to the weight of the testimony, and to the witness as to whether he wishes, upon the alleged incompleteness, to commit himself.

Mr. Randolph:
We reserve an exception.

The Court:
Answer the question.

A. I will answer that question assuming all of these statements are true; and assuming that, my opinion would be that he was not in a condition to know the nature and effect of the signing of the paper.

Cross Examination.

Q. Doctor White, in passing upon a patient's mental capacity at any given time, you always like to examine that patient personally and as carefully as a patient would be examined if he were going to a clinic for a physical examination, do you not?

149 A. Yes sir, you always want to examine a patient when you can, of course.

Q. It is true, is it not, that an opinion expressed by you on the basis of what someone has told you about a patient is greatly speculative; is it not?

A. No, I am assuming that those facts are all true, just as though I had found them so myself.

Q. But in assuming certain facts, do you understand the limits of all of those facts, by having them stated to you, just as well as you could if you had examined the patient?

A. Well probably not; there might have been things I would have wanted to ask the patient or investigated, which they didn't do; and they probably got some point I would not have gotten.

Q. In the question you just answered and gave your opinion as to Mr. Williams' mental condition, what facts did you assume that he was unable to remember?

A. The whole condition—his whole history, and the entire outline of his condition, all taken together.

Q. No, my question was, what specific facts did you assume that he was unable to remember as to recent events. Did you make any assumption as to any specific facts?

A. No, by what the witnesses said.

Q. What you heard in the Courtroom?

A. What I heard the witnesses say. I have to base my opinion entirely upon the evidence I heard, upon what might be mentioned in the hypothetical question given.

Q. Then in giving your opinion in addition to the statement made to you by Mr. Williams, you also considered what you had heard in the Courtroom, from the witness stand,

150 A. Yes, sir.

Q. And not solely what Mr. Williams had stated to you?

A. Well, the way I remember it, I I think practically everything had a basis in the evidence which he included in his hypothetical question.

Q. Now, my precise question is, did you consider not only what Mr. Williams told you, but what you had heard witnesses state on the witness stand?

A. It is all so interlaced.

Q. Then you consider, in addition to what Mr. Williams stated to you what the witnesses stated on the witness stand?

A. Yes, sir, to some extent, to be sure.

Q. Now, Doctor White, would you say that just from what Mr. Williams told you,—leaving out what you heard on the witness stand or anything else, would you state that from what Mr. Williams told you, you would be in as good a position to judge whether or not there was anything the matter with Mr. Williams' mental condition on September 18, 1931, as would be Dr. Nibling, who examined him personally, who gave him a very minute examination over a period of several days?

A. I don't believe I got that.

Q. I say, do you consider, from the facts alone that Mr. Williams stated, leaving out anything else you may have heard, do you consider from those facts alone that you are in as good position to judge of Mr. Williams' mental capacity on a given date as Dr. Nibling would be, who made a personal examination of Mr. Williams over a period of several days?

Mr. Williams:
We object to that as argumentative.

151 The Court:
Yes, I think it is argumentative.

Mr. Randolph:
We except.

Q. Now, Doctor White, did you base your opinion upon any one fact more than any other, or upon all of them collectively?

A. All collectively.

Q. Now, will you mind repeating just those facts collectively that you based your opinion upon; every fact that you did base your opinion upon?

A. I may not be able to recall all of them, but in the first place this man had had serious financial losses, and that would put him in a very depressed condition. And to begin with, he was 55 years of age, at the time when his powers of resistance and recovery are not as good as they are in a young man. Then he had this, which I assume from the symptoms that have been given—that he had cirrhosis of the liver, which is a disease of long-continued existence, a very depleting condition, inasmuch as it destroys the functional activity of the liver. Then, in addition to that, was this infection of the teeth, which was very serious, from what they say about it, because he had some reaction afterwards—he had some fever; I don't think they

said he had any chills, but he had a rise in temperature. Then he had that intense and continued hemorrhage, which is the most weakening and depleting part about the history of the case. I think he bled for two or three days something like that and rather extensively. Now there is not anything scarcely that will weaken a human being like a continued hemorrhage will. And those, as I recall it, are the important factors upon which I base my opinion. Then there was another fact that I believe was proven, that he must
152 recognize his inability to attend to business, by stating to these gentlemen that he was not in a condition to attend to business that he was too sick. I believe that it is not in those words, but I think one of the witnesses testified to something of that kind, and hearing somewhat of the argument that was going on without understanding the wording, except that part of it, I believe one or two stated that he told these gentlemen that he was not in a condition to attend to business, and that he was a sick man. That showed that he realized his condition. I believe those are the principal facts.

Q. Do you recall Mr. Williams' stating that to you anything about Williams' realizing or stating that he was not in condition to attend to business?

A. No, sir, he didn't say that to me.

Q. Do you recall that Mr. H. O. Williams, in putting the question to you, stated anything to you about that?

A. No, sir, he didn't put that there, and that is one of the facts that from the evidence I had combined with the hypothetical question; I could not disassociate that from the other.

Q. Now, doctor, as a matter of fact, you don't know anything that was said there that morning, do you?

A. No, sir, not of my own personal knowledge.

Q. Between Williams and the two men present?

A. No, sir.

Q. And the only other opinion that you have is what you gained in the Courtroom from hearing the witness Jordan, as to a small portion of that conversation, isn't that true?

A. I didn't get that—

Q. The only information that you had as to what was said and done in that conversation between Mr. Williams and Mr. George Lee and Mr. Humlong on that morning, September 18th, was what you heard the witness Jordan say, here in the Courtroom?

153

A. That is all I knew about it.

Q. You didn't hear anyone else say anything?

A. How is that?

Q. You didn't hear anyone else say anything than the witness Jordan?

A. I don't remember; it seems to me there was two witnesses—I got it in my mind there was two.

Q. But you don't remember?

A. No, sir, I don't remember the name of the other; I know Jordan was one.

21.

E. G. BROWN, a witness for the defendant, testified substantially as follows:

I have lived in Dallas about 12 years. I am vice-president and actuary of the Southwestern Life Insurance Company and have been for 12 years. I prepared for the examination of the Actuarial Society of America. I am a fellow of that society. Prior to my association with the Southwestern Life Insurance Company, I was actuary of the Columbian National of Boston, from April 1918, to August, 1920.

The term "dividend addition" has a well-recognized meaning in the life insurance business. It means a

relatively small amount of paid up insurance issued as the result of a dividend. It is purchased with the dividend. I think the term has always had that meaning, from an actuary's standpoint.

154 The actuary of life insurance company is a man who makes the mathematical computation of the rates and prepares the various policy forms.

Cross Examination

Q. Mr. Brown, the term "dividend addition" has also the meaning, has it not, of dividends declared on and by virtue of the terms of a policy?

A. No, sir. I have never read any decision in which the testimony of actuaries was taken and different definitions given. I understand that there have been cases of that nature. I have never heard of a case in which actuaries have given the opinion that dividend additions may be dividends declared on by virtue of the terms of the policy and in possession of the company, and I cannot believe that it is possible.

I have not read any construction by any judicial authority of the term "dividend addition". I have looked the term up in a book known as Words and Phrases. I did not find the case of Spink v. Insurance Company, a Kentucky decision, in the volume that I looked at. I never read that case, or the case of Jones v. Great Southern Life Insurance Company, in 45 Federal (2d).

Q. You do not undertake to tell this jury, do you, Mr. Brown, or to tell the Court, that you know what the term "dividend additions" means as used in the Texas non-forfeiture statute?

A. I certainly do.

Q. And you are now testifying as to what is meant by the term "dividend additions" as used in Article 4732, Section 7 of Texas statutes?

A. Yes, sir.

155 Q. And as to what the legislature of Texas meant by the use of that term?

A. I am not the legislature of Texas; I am testifying as an actuary.

Q. As to what the term means in actuarial science?

A. Certainly.

Q. Now, then, Mr. Brown, that nonforfeiture statute provides, in effect, that the "dividend additions" shall be taken into consideration as a part of the policy values?

A. If there are any, yes, sir.

Q. The term "dividend additions", as you interpret it, means insurance in some amount paid for life?

A. Yes, sir, purchased with a dividend.

Q. And such insurance does not require any premiums thereafter paid on it, does it?

A. No, sir.

Q. Never does forfeit?

A. No, sir.

Re-Direct Examination.

Q. Such additions have value for converting into other forms of insurance, do they not?

A. Well, ordinarily, they have a provision for conversion back to insurance.

Q. Would they have a value for purchasing extended insurance?

A. Not in and of themselves, they would not, no, sir.

156 22.

HERVEY HUMLONG, a witness for the defendant, testified substantially as follows:

I am in the ranching and sand and gravel business, and live in San Angelo. I knew P. H. Williams, who

lived near Tankersley, Texas. I met him in September, 1931, when Mr. George Lee, of Dallas, and I went out to his place on some business that Mr. Lee had with Mr. Williams. Mr. Lee represented the firm of Lee & Lee, general agents of the Union Central Life Insurance Company at Dallas, as attorney of such firm.

We left San Angelo about 10 or 10:30 in the morning. It takes about 45 minutes to get out to Mr. Williams' place. We went to his house and knocked at the door, but no one responded, and we went further up the farm to find somebody, to see if we could find out where Mr. Williams was. We made inquiry of some Mexicans. We wandered around over the farm for 45 minutes or an hour, and then went back to Mr. Williams' house. We met Mr. Williams. He was dressed at the time. Mr. Williams and Mr. Lee talked about their business, and I didn't pay a great deal of attention to what they said. I do recall that Mr. Lee was out there to collect a note, and that they talked about this note. Mr. Williams wanted to connect the note and his insurance policies up together, and Mr. Lee said that he was not there in regard to the insurance at all, that he could not do anything about, and didn't know anything about, the insurance part of it, and that his only business was in regard to the note. They finally came to a settlement of some kind, and, as I remember it, Mr. Williams released some dividends he had coming on his policies as part payment on the note, and Mr. Lee took his note for another year, I believe, for the remainder. I did not take part in the conversation in that connection to any
157 particular extent. Mr. Williams and I talked about the farm and the ranch and his cattle and things like that a good deal. He and I probably talked about half the time, and were there talking with Mr. Williams altogether not over 45 minutes, or possibly an hour.

Mr. Williams signed an instrument there in my presence. I am pretty sure he signed another note, and he must have signed some papers in regard to releasing these dividends.

I did not make any particular observation as to Mr. Williams' physical condition. He said that he didn't feel well, because he had had his teeth pulled out the day before. I don't recall whether he was expectorating any; that made no impression upon me. I do not remember seeing any blood expectorated. I did not observe anything in Mr. Williams' conversation or in any talk on his part that was irrational. I did not observe any forgetfulness; in fact, there was nothing to have been forgotten that I talked to him about. I did not observe any failure of his to remember what Mr. Lee had told him. I did not notice any unnatural or peculiar look out of his eyes.

I knew that Mr. Williams and I talked about the cattle and the farm. He told me where he got his herd of cattle, how he was trying to build it up, how proud he was of it; I think he told me that he had a large amount of oats stored in his bins that he was holding for a better price.

Cross Examination.

I am Mr. George Lee's brother-in-law. One member of the firm of Lee & Lee is my father-in-law; the other I am not related to. When we first arrived at Mr. Williams' house to take up this business transaction Mr. Williams protested. Yes, he told us he was sick.

158 I don't recall that he told us that he was sick. I don't recall that he told us that he was in no condition to bother about it, or that he would see us in town in a few days. He might have, but I don't recall it. I don't think that we could have been at the house for two hours or thereabouts. We got back to town in time for late lunch. I know that

we did not eat our lunch until we got back to town. Lunch was over at my home when we got back. I don't think it was much after one o'clock when we got back. I don't think it was much after one o'clock when we got there. It was probably not later than 1:40.

I met Mr. Lee that morning at the train. We went home to breakfast, and from there we went to my office. I attended to routine business, and after a while he said he would like to drive out to Mr. Williams' place. I told him if he cared to, we would go about that morning. I imagine we left around 10:00 or 10:10. We must have been at the office half an hour or an hour. I didn't know at the time that Mr. Williams was sick. I had not learned anything about his having gone through the clinic. We got off for the ranch as soon as we could, and came back as soon as we could. We probably talked with Mr. Williams 15 or 20 minutes in the house that is when he and I did most of our talking about the cattle. He followed us out to the gate and he and I had a talk there for a few minutes. The cat was right at the gate.

We would talk about the cattle off and on, a little during the time Mr. Williams and Mr. Lee were talking about the other business.

Q. Isn't this what happened: That Mr. Williams told you men when you went there and he discovered what your mission was there, that he was too sick to talk business, and got mad or out of humor with you, or rather with Mr. Lee, and that you then took over the conversation and diverted his attention by bragging on his fine cattle, and you got him in good
159 humor? Isn't that what you did?

A. I may have.

Q. You knew he was proud of his cattle?

A. Yes, sir.

Q. And diverted his attention in an effort to assist Mr. Lee to accomplish his purpose?

A. Yes, sir.

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Deposition of GEORGE T. LEE

The defendant introduced portions of the deposition of George T. Lee taken by the defendant on oral examination and answer on October 11, 1932, being substantially as follows:

From Direct Examination

I am 39 years old and am an attorney at law at Dallas, Texas. J. F. Lee and W. B. Lee, composing the firm of Lee & Lee, are general agents of The Union Central Life Insurance Company, at Dallas.

I met Peter Hardy Williams of Irion County once; that was on September 18, 1931, when I was sent to San Angelo by Lee & Lee to have a conference with Mr. Williams relative to certain dividends refundable under certain of his life insurance policies issued by The Union Central Life Insurance Company. Mr. Harvey Humbeng, of San Angelo, and I met him on his ranch near Tankersley, Texas. We arrived there about 11:00 o'clock in the morning and went to the ranch house, knocked on the door and no one answered. After waiting quite a while we went over to another house, where some Mexican Workers were living with their wives, and they directed us up the ranch road up the river, and said we would probably find Mr. Williams there. I think they said that they had seen Mr. Williams that morning. I do not recall exactly. But we asked them where Mr. Williams was, and they told us up at the other end of the ranch. We were unable to find Mr. Williams up there, and went back to the ranch house, knocked on the door again, and Mr. Williams came to the door. Mr. Williams was fully dressed. I introduced Mr. Hum-

long and myself, and he said he was P. H. Williams. I told Mr. Williams I had come to ask him to sign an instrument releasing the dividends on these policies to Lee & Lee so that they might be credited on a note that he had given for the premiums on the policies, and to execute a new note for the remainder of the debt. I told him that I was handling the matter for Lee & Lee, that I was an attorney, and not connected with the firm.

Mr. Williams at first demurred, saying that he was "peeved" at the company, etc., and did not want to sign the instrument. We discussed other matters not related to the transaction some 15 or 20 minutes, and finally I persuaded Mr. Williams to sign a written order to the company releasing the dividends to Lee & Lee, and he executed a note for the remainder of his debt to Lee & Lee, for moneys advanced by Lee & Lee for the previous year's premiums. Mr. Williams had given Lee & Lee a note for the debt.

Mr. Williams then signed, in my presence and in the presence of Mr. Williams, the order to The Union Central Insurance Company which I had prepared. I examined the original of the instrument yesterday, and this is is a photostatic copy which I compared with the original yesterday, and which I now identify as being a true and correct copy of the original.

161 The defendant introduced in evidence the original instrument just identified by the witness, reading as follows:

September 18th, 1931.

State of Texas,
County of Irion.

To the Union Central Life Insurance Company, of Cincinnati, Ohio:

Gentlemen:

"You are hereby authorized and directed to pay to Lee & Lee, of Dallas, Texas, the sums due me as dividends on policies now lapsed, as follows:

Policy.	Amount of Dividend.
# 937853	$112.20
# 940457	74.80
# 989356	184.75
# 989357	184.75
# 989358	110.85
Total amount of Dividends	$667.35

(Sgd.) P. H. WILLIAMS.

Witnesses:
(Sgd.) GEO. T. LEE."

Witness George T. Lee resuming):

We had our conversation in the front room leading directly onto the front porch; there was no bed in the room. Mr. Williams stood up and then sat down during the conversation; at no time was he lying in bed, while I was out there.

Q. Did you make any observation as to his mental condition during the time you were talking with him?

A. Yes, sir; I observed him very closely.

Q. What observation did you make as to his physical condition?

A. He seemed to be in fair shape physically.

Q. Did he make any statement as to his
162 physical condition in your presence?

A. Yes, sir. He told me that he felt bad, that he had had some teeth extracted, and that he could not talk very well. He said that he had had his teeth extracted recently, but I don't recall the date.

Q. What was your observation as to his mental condition?

A. Well, he appeared perfectly normal.

Q. Did you observe in the course of your conversation with him any forgetfulness on his part?

A. No, sir.

Q. Did you observe any lack of understanding of the conversation?

A. No, sir; he seemed to understand the whole conversation.

Q. State whether or not he talked rationally in your opinion?

A. Yes; sir; he did.

I told Mr. Williams that it was the dividends on the policies mentioned in that written order that I wished him to assign to Lee & Lee. I told him I wanted him to assign the dividends on all the insurance that he had. He seemed to understand thoroughly that it was the dividends on all those policies that he was directing the payment of to Lee & Lee. In the course of the conversation he had said that he was entitled to these dividends, that he did not think he had been treated fairly, and that he didn't feel like giving those dividends to Lee & Lee, although he admitted the indebtedness. That was in the first part of the conversation. Later on, he agreed to assign the dividends, because he did owe Lee & Lee this money on the insurance, which he could not pay. He stated that he could not pay the notes.

163 I told him that the policies had lapsed, according to my information and belief, and that he was merely assigning something that did not belong to him, but was really Lee & Lee's and should properly go to Lee & Lee, inasmuch as they had paid the note which he had given for the premiums which they had paid to the company themselves; that if he could not pay the premiums, that the least he could do would be to pay Lee & Lee these dividends, which were returnable to him on the lapsed policies, and give a note for the balance; and he finally agreed to it and did do it.

Mr. Williams' failure to pay the premiums was mentioned as the cause of the lapsed policies, also the further fact that he has not paid the premiums for the year before, that is, for two years. He had given a

note, and had not paid the note. I refer to the premiums of 1930 and 1931, and the note for the 1930 premiums. It is correct that so far as the company was concerned the 1930 premium had been paid and that Lee & Lee had paid it to the Company, and not Mr. Williams, and Mr. Williams admitted that was true.

Q. Was there any expression on his part as to whether or not he was suffering any pain at the time of the conversation and if so, how much pain?

A. No, sir. He said he was not suffering any pain; that these teeth had given him some trouble, and he could not talk, except with difficulty. But he did not state that he was in any pain at all, and did not show any.

Q. Did he say anything about his gums being swollen?

A. Yes, sir; I think maybe he did say his gums were swollen.

Cross Examination.

Q. Mr. Lee, when you first arrived there, isn't it a fact that Mr. Williams told you that he was feeling badly from the effect of having these teeth
164 pulled, and that he did not want to talk business, and was not in any condition to talk business?

A. I don't recall that, Mr. Anderson. He did tell me that he was not feeling very well, that he had had his teeth extracted, but I don't recall that he said he would not transact any business.

Q. He was rather irritable and rather discourteous?

A. Yes, sir; he was irritable and discourteous.

Q. That attitude was maintained by him for several minutes after you got there; then you changed the subject and soothed his feelings?

A. Yes, sir; that is correct.

Just Mr. Humlong, Mr. Williams and I were present. An elderly woman I think it was Mr. Williams' wife may have come into the room and gone out again; I know she was not in the room during the course of the conversation.

The note given for the 1930 premiums was for about $1630. That is the original note that you hand me. The pencil marks on it are my own notations made the day before he signed the renewal note.

The defendant introduced in evidence the note given by P. H. Williams, reading as follows:

"1643.63.

San Angelo, Texas, 6-20 1930.

"On or before 6 months after date, without grace, for value received, I, we, or either of us, promise to pay to the order of The Union Central Life Insurance Company of Cincinnati, Ohio, Lee & Lee, Dallas, Texas, Sixteen Hundred Forty Three & 63 100 Dollars, with interest at six per cent per annum from date until paid, payable at San Angelo, Texas, being for premium due on Policy No. .....in said Company.

"This note or any extension thereof shall be a first lien on said policy and a setoff in the calculation of policy values. If this note is not paid at maturity, then it shall become due and payable at Dallas, Dallas County, Texas, and if placed in the hands of an attorney for collection, or if collected by suit, or through the Probate Court, the parties liable hereon, jointly and severally agree to pay ten per cent on the amount then due hereon as collection fees.

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(Sgd.) P. H. WILLIAMS.

P. O. 310 Western Reserve Life Bldg."

Written across the face of the note in pencil, is the followings:

"Renewed by new note for $914.77 this 18th day of Sept. & cash of $852.10.

GEORGE T. LEE,
for Lee & Lee."

and on the reverse side appears the signature "Chas. A. Poteet" as an indorsement.

(Witness George T. Lee resuming on cross examination):

Q. You told Mr. Williams that since Lee & Lee had paid that money for the 1930 premiums and since he had failed to pay his 1931 premiums, his policies had lapsed, and that the dividends were payable?

A. I explained to him that, as a matter of justice, they belonged to Lee & Lee.

Q. They were payable in cash and were payable to them?

A. Yes, sir; they ought to be paid to Lee & Lee. I told him they belonged to him unless he was willing to transfer them to Lee & Lee.

I don't recall that Mr. Williams specified the day, but he told me he had had his teeth extracted recently, and that he had been losing sleep. I don't recall that he told me that he had lost a lot of blood. During the conversation he would spit a good deal. He would get up and go across the room and spit, but I didn't notice the contents of the sputum and I didn't see any blood myself. He followed us out when we left to get in the car. He came to the car with us, and seemed to feel a whole lot better, and was very pleasant. I don't know how to account for the reversal of his attitude except that Mr. Williams and Mr. Humlong had had a very pleasant conversation about ranch-

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ing and oil and things like that, and Mr. Williams just simply got into a better disposition. After he and Humlong concluded their conversation about the ranch and other things I simply repeated my former statements, and he said "Well, there is nothing to do, I guess, but to sign this thing, but I'm sore about it." He never did get to where he was delighted to sign it or anything like that. His consent to put his signature to the order was rather reluctantly given; he didn't jump at it.

Yes, it was when Mr. Williams was having the conversation with me showing his attitude was quite hostile that Mr. Humlong injected himself into the conversation. We wanted to soothe him down; I didn't want him sore; you cannot transact business when a man is hostile to you, and I knew that I could not get what I wanted if he remained in that attitude.

Re-Direct Examination.

The lady I took to be Mrs. Williams was back and forth from a back room to the back porch, or a place there in the rear. At times she would be 10 feet away, and at times she would be out of hearing and out of sight. She was performing her duties back there, cooking, going back and forth from the kitchen to the rear of the house. Our entire conversation with Mr. Williams in the house, as I recall, lasted about half an hour. Mr. Humlong was present throughout the conversation.

Mr. Williams appeared to be a man around 58 or 55. He was a fairly tall man. His hair was getting a little thin and a little gray. He was spare of type,
167 and would weigh about 175 or 165 pounds, and was about 6 feet tall, or 5 feet 11, or something like that.

Q. Did you make any statement to Mr. Williams as to whether or not you had any conversation with

The Union Central Life Insurance Company, and if so, what the connection was?

A. I told him that I was not connected with the insurance end of The Union Central Life Insurance Company, did not represent them; that I was not their attorney, and that in this particular instance I was a lawyer in Dallas representing Lee & Lee, the general agents for the Company; that I had no authority to bind The Union Central Life Insurance Company to any action whatever; that my only purpose was to secure a release of those dividends to Lee & Lee.

I did not notice any variation in the intelligence of Mr. Williams' conversation at any time. He seemed to me to be perfectly rational all the way through. I did not notice his closing his eyes or being drowsy or outwardly manifesting any sleepiness. I did not notice any peculiar or unusual, abnormal expression out of his eyes.

Re-Cross Examination.

The first part of the conversation between Mr. Williams and myself, in which he was consistently refusing my request must have been about five or ten minutes. Then Mr. Humlong broke into the conversation, and he and Mr. Williams discussed other things for about ten or fifteen minutes—about Mr. Williams' beautiful cattle, his good-looking crops, etc. After he and Mr. Humlong finished talking, I then talked to Mr. Williams again about five minutes before he began to indicate any kind of willingness in the matter. Our whole conversation with
168 Mr. Williams in the room did not last more than approximately half an hour; that is the way it occurs to me. We got there about 11 o'clock in the morning, and we must have been at the ranch altogether about an hour from the time we got on the ranch until we left. We drove back to San Angelo in

time for lunch. To say that we were in the room as long as two hours with Mr. Williams I think would be long that would be excessive. We might have been in the room three-quarters of an hour, but I don't think it was over that as I recall about half an hour. It may have been that Mr. Humlong and Mr. Williams discussed other subjects longer than ten minutes, because more of the conversation was taken up in Mr. Humlong's conversation than in mine.

Re-Direct Examination.

Before I left for San Angelo I had the pleadings prepared to file a suit against Mr. Williams on the note for $1643.63 and to run a garnishment against The Union Central Life Insurance Company. I may have told Mr. Williams during the conversation that in the event the instrument was not signed, there was no other alternative; I think perhaps I did tell him that.

Re-Cross Examination.

At the time Mr. Williams signed the instruments that I have identified he was fairly friendly; I don't think that he was happy over the situation.

24.

Deposition of W. F. Pattison.

The defendant introduced portions of the deposition of W. F. PATTISON taken by the defendant on written interrogatories on October 12, 1932, as follows:

169 From Direct Examination.

I attach the original of the application, in two parts, Part I being dated June 4, 1927, executed by P. H.

Williams, pursuant to which, as amended, the policy in suit was issued. I attach also the amendment of the application, dated July 29, 1927. It is merely an agreement by P. H. Williams that the policy in suit may be issued without disability benefits.

The premium of June 10, 1931, on this policy and all other policies was not paid to the Company, and nothing was ever received or applied thereon by the Company. No amount was ever paid on the policy loan of $848.

The total indebtedness and advances on the policy in suit of June 10, 1931, including interest due, was $898.88. I attach a check dated September 9, 1931, for $556.60, payable to the order of Peter H. Williams, the insured, covering the 1931 dividends on the policy in suit and on three other policies, which was sent by the Company to Lee & Lee and was by them later returned with their letter of September 14, 1931. After the return of such check, the Company retained the amount of the dividend on each policy until September 28, 1931, at the request of Lee & Lee. All previous dividends, that is, the dividends due in 1928, 1929 and 1930, had been used as cash in reduction of the premium, and were not retained by the Company at interest or used to purchase paid-up additions. The insured exercised the option of using the dividends in reduction of the premium annually, as shown by the premium receipts issued. The Company received written authority from the insured, Peter H. Williams, with reference to the disposition of the dividends to Lee & Lee. The original is dated September 18, 1931, and I attach the same to my deposition (being the one in evidence, identified by the witness George T. Lee). On the authority of the order dated September 18, 1931, signed by the insured, the Company paid the amount of the 1931 dividend under each of
170 the policies to Messrs. Lee & Lee. It did so in order to comply with the following pro-

visions contained in the policy, paragraph 12, reading as follows:

"In the event of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected, or if the policy shall lapse, the dividend then due shall be paid in cash."

The amount of the dividends then due on all such policies was paid in one check of $667.15, to the order of Lee & Lee, dated September 28, 1931, which check, with accompanying memorandum, I attach to my deposition, and which check was paid by the Company. I do not find that we have received any other papers or written communications from Peter H. Williams.

I attach carbon copy of a letter directed to the insured under the policy in suit, to wit: policy No. 940457, which letter is dated October 7, 1931, and advises him of the cancellation of the policy. The original is not in the possession of the Company.

The Company took no action towards applying the 1931 dividends to the payment of the June 10, 1931, premium or towards the purchase of any extended insurance. I had no information, and none is contained in the files, other than what I have heretofore referred to in my deposition, as to what disposition Peter H. Williams, prior to his death on October 15, 1931, desired concerning the disposition of the 1931 dividends.

The Company had no information as to mental competency of the insured at the time of the transmission to Lee & Lee of the check for the 1931 dividends, or at any time prior to the death of P. H. Wil-
171 liams.

The first information the Company received as to the competency of the insured was in a letter from our attorneys, Locke, Locke, Stroud & Randolph, dated March 17, 1932. As to what information, if any,

I had, in the files of the Company contained, at the time of the transmission of payment or check for the 1931 dividend to Lee & Lee, or at any time prior to the death of Peter H Williams on October 15, 1931, as to how the said Williams happened to execute the order to Lee & Lee for the Company to pay Lee & Lee the dividend of 1931 on the policy in suit, and as to any statements or representations or promises of Lee & Lee of Charles Poteet or anyone else to the said Peter H Williams, in connection with such order or otherwise the correspondence discloses that the insured was indebted to Messrs Lee & Lee for advances of premiums on his policies The correspondence does not show that Messrs Lee & Lee or Mr Charles Poteet made any representations or promises.

The notice sent by the Company to the insured with reference to the 1931 dividend and the 1931 premium, which notice was pleaded by the plaintiff, was sent the insured through the agency of Lee & Lee at least 15 days prior to June 10, 1931 Such notice was sent in accordance with our usual custom of notifying policyholders of an approaching premium

Q - State what action, if any, the Company customarily had made prior to transmitting any such communication to a policyholder, or customarily made at the same time that it transmitted such printed form of communication to a policyholder, or customarily made after transmitting such printed form of communication

172 to any policyholder, with reference to the application of the dividend mentioned in such communication to the payment, in whole or in part, of the premium mentioned in such communication.

A. The Company at no time, prior to the notice or thereafter, took any action with reference to the application of the dividends mentioned in such notice.

The defendant introduced in evidence the following papers attached as exhibits to the deposition of W. F. Pattison:

EXHIBIT E.

"Application for Insurance to The Union Central Life Insurance Company, of Cincinnati, Ohio.—Part I.

1. a. Full name of applicant Peter Hardy Williams.

b. Residence (No. .....Street, or R. F. D. No. 110 miles in S. W. direction from City of San Angelo, County of Crocket, State of Texas.

c. How long have you lived there? 10 months.

d. Former residence? San Angelo, Texas.

e. P. O. Address for notices Big Lake, Tex., P. O. Box 122.

2. Give place and date of your birth. Town Milford, County Ellis, State of Texas. Mo. Dec., Day 10th, Yr. 1875. Age nearest birthday 51.

3. a. Plan of Insurance Ordinary Life.

b. Amount of insurance—$25,000.

c. Are disability benefits desired? Yes.

d. Is double indemnity desired? No.

e. Premiums (regular) $1122.75 (dis. ben.) $153.75 (dbl. idem.) $.....payable annually on.....

4. a. What is your occupation? Oil Producer.

b. Full particulars as to duties—Owner and Superviser of Productions.

* * * *

173 5. a. Beneficiary (with privilege to change)—Nannie May Williams.
b. Relationship to applicant—Wife.

* * * * *

10. a. Has first premium been paid? Yes.

b. If so, state the amount paid, as follows: I have settled the premium by payment of $1276.50 for which I have received binding receipt form 401 I, to the terms of which I agree.

11. It is agreed that any insurance issued on this application shall not take effect until the policy has been delivered to the applicant and the first premium due thereon has been paid and accepted by the Company or its authorized agent during the applicant's lifetime and good health; provided, however, that if the applicant pays the first premium in advance and so declares at question 10 hereof and receives therefor binding receipt in the form attached hereto (which is the only form of receipt for payment of first premium in advance authorized by the Company) the terms of said binding receipt shall apply.

I agree to be examined by the Company's Medical Examiner and that my statements in this application and to the Medical Examiner are made for the purpose of obtaining this insurance. I understand that any note accepted by the Company in connection with the first year's premium must be secured to its satisfaction. I also agree that payment of the first premium shall keep the insurance in force only to the date fixed in the policy for payment of the next premium.

Witness—Dated at San Angelo, Tex., this 4th day of June, 1927.

(Sgd.) CHAS. A. POTEET,
Agent.

Signature of Applicant:
(Sgd.) PETER H. WILLIAMS.
(Sgd.) LEE & LEE,
General Agent.

174 "Aplication for Insurance—Part II."

* * * *

EXHIBIT F.

"Cincinnati, O., Sep. 9, 1931. No. DA149984.

The Union Central Life Insurance Co.

Pay to the order of Peter H. Williams, San Angelo, Texas, Five Hundred Fifty-six & 50/100 ($556.50) Dollars.

Payable at First National Bank, Cincinnati, O.
(Sgd.) R. L. TROEGER,
For the Treasurer."

EXHIBIT G.

"Cincinnati, O., Sept. 28, 1931. No. DA 151513.

The Union Central Life Insurance Co.

Pay to the Order of Lee & Lee, 1127-28 Athletic Club Bldg., Dallas, Texas, $667.35, Six Hundred Sixty-seven & 35/100 Dollars.

Payable at First National Bank, Cincinnati, O.
(Sgd.) R. L. TROEGER.
For the Treasurer."

"The Union Central Life Insurance Company."
Home Office Cincinnati, Ohio.

The attached check is in settlement of the item stated below.

The proper indorsement is the only receipt or acknowledgment required.

Policy #937,853, 1931 Dividend		$112.20
	Policy #940,457, 1931 Dividend	74.80
175	Policy #989,356, 1931 Dividend	$184.75
	Policy #989,357, 1931 Dividend	184.75
Policy #989,358, 1931 Dividend		110.85
		$667.35

Life of Peter H. Williams."

EXHIBIT H.

"The Union Central Life Insurance Company,
Cincinnati.

Pol. No. 940457, On the Life of Peter H. Williams.

Mr. Peter H. Williams,
Central Hotel,
San Angelo, Texas.

Dear Sir:

"On account of failure to pay premium due June 10, 1931, this policy, in accordance with the terms of an advance secured by the policy, became null and void on June 10, 1931, and has been canceled.

"The agreement for the advance has been marked 'Paid by cancellation of the policy' and is held by the Company solely as evidence.

"Yours very truly,

(Sgd.) W. HOWARD COX,
Secretary."

October 7, 1931.
HH.

(The portions omitted, indicated by asterisks, are not relevant to the present litigation.)

176 The defendant introduced in evidence the dividend and premium statements sent to P. H. Williams for the years 1928 and 1929, respectively, reading as follows:

"The Union Central Life Insurance Company,
Home Office, Cincinnati, Ohio.

You are hereby notified that a premium as described below will become due and be payable subject to the conditions of this notice.

Premium and Dividend Statement.

Amount of Premium	$449.10
Dividend Reduction	63.60
Net Premium Due	385.50

Notice.

If the Dividend is not to be used in reduction of premium due in accordance with above statement send settlement covering the premium due and instruct whether dividend is to purchase additional insurance or remain at interest.

Amount of Premium.	Policy Number.	How Payable.	Date Due.	Month.
$449.10	940,457	A	10	June 1928

Peter H. Williams,
Central Hotel,
San Angelo, Tex.

Please make payment before that date to Lee & Lee, Genl. Agts., 1127-28 Athletic Club Bldg., Dallas, Tex. Drafts and money orders should be made payable The Union Central Life Insurance Company. Return this notice and receipt will be sent you."

(Reverse side reads as follows:)

"Unless said premium shall be paid to the Company, or to a duly appointed agent or person authorized to collect the same on or before the day it falls due, your policy and all payments thereon will become
477 forfeited and void, (except as to the right to a surrender value or paid-up policy.).

"To conform with the laws of certain states the above notice is given, but a cash payment of the premium without interest will be accepted at any time within thirty-one days from its due date.

"Please notify the company at the home office and also the agent, of any change of address, giving the number of the policy.

"Agents are not authorized to countersign receipts, unless signed by some officer of the Company, to grant permits, make or alter contracts, waive forfeiture, or make any alteration of a renewal receipt.

(Sgd.) R. F. RUST, Secretary."

The statement for 1929 is in the same form, the only change being in figures, as follows:

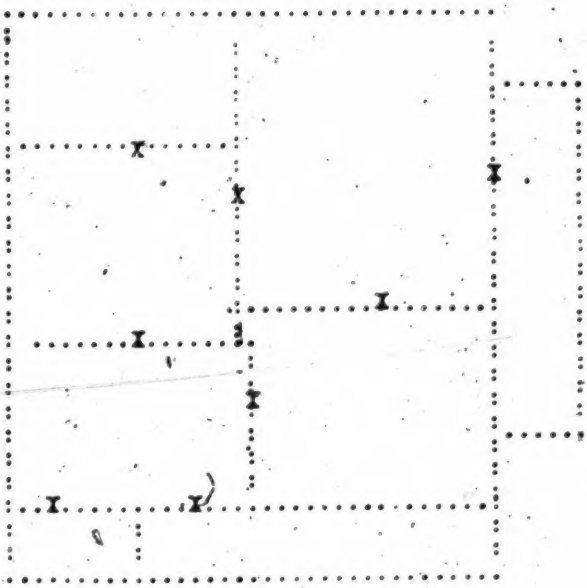
"Amount of Premium $449.19
Dividend Reduction 67.10

Net Pfemium due 382.00

* * * *

Amount of Premium.	Policy Number.	How Payable.	Date Due.	Month.
$449.10	940,457	A	10	June 1929"

The defendant introduced also the floor sketch of P. H. Williams' farm house, drawn by the Plaintiff, as follows:



179 26.

ARTHUR J. KOEPPE, a witness for the defendant, testified substantially as follows:

I am an actuary. I am assistant actuary of The Union Central Life Insurance Company, and have been for eleven years. I graduated from the University of Berlin in mathematics and then took courses prescribed by the Actuarial Society of America, and passed their examinations, and now hold the degree of Fellow of such society. I became a Fellow in 1918. I am also actuary for the Columbia Life Insurance Company. The term "dividend additions" has a well-recognized meaning in the life insurance business. A dividend addition is the amount of whole life insurance or endowment insurance purchased by an annual dividend used as a single premium to purchase that insurance. The term has had that meaning in the life insurance business, to my knowledge, since 1910, when I came to America. Such form of paid-up insurance, that is, the dividend addition, has a net value.

Cross Examination:

I am now with The Union Central Life Insurance Company, and was with them in 1931. The term "dividend addition" does not have any other meaning, to my knowledge.

A gross premium charged for participating policies is more than such premium for non-participating policies. The additional charge is made for the reason that it is a participating policy, participating in dividends.

Q. In other words, the policy holder pays an additional amount that is added to the ordinary non-participating gross premium? He pays an additional amount to provide for the participating feature of the policy?

A. No, sir, he does not.

180. Q. I will ask you if it is not true that every participating company in the United States adds on to the premium an additional charge for that purpose?

A. Which premium?

Q. Annual gross premium.

A. No, they do not add that to the annual gross premiums they charge; they charge an annual gross premium; there is nothing added to it.

Q. And that annual gross premium they charge is more than the annual gross premium on the same kind and character of a policy without the participating feature?

A. The policies in most companies, yes.

Q. And isn't it a fact that the dividend formula used by your company takes into consideration the loading of the premium?

A. You have not defined the "loading" yet. They take account of loading on the premium, but not this loading. The loading on the premium is used in determining part of the dividend; yes, sir.

Q. And isn't it a fact that the term "dividend addition" also means, in addition to what you have stated it means, a sum added to the premiums paid, to provide for dividends?

A. Oh, no, it has never been used in that way, to my knowledge.

Q. You have never heard of it being used in the sense of dividends in the hands of the company allotted to a policy?

A. No, I have never.

Q. Now, you stated a while ago that "dividend addition" means a form of insurance that is paid up for life, is that true?

A. No, sir, that is the amount of insurance,
181 either for whole life, or as an endowment, purchased by a dividend; if the dividend arises from ordinary life or limited term life policies, the

dividend is for the whole of the life. If it is an endowment policy, it is only for the term endowment, and paid at maturity; together with the amount of insurance.

Q. The dividend addition does not call for the payment of any future premiums on dividend additions, does it?

A. No, it does not. It is purchased with a single premium. It is therefore non-forfeitable.

Q. Now, isn't it true that the reserve value the reserve value of the dividend addition is always equal to or more than the dividend with which the addition is bought?

A. That is not true.

Q. What do you mean by "the reserve on a dividend addition"?

A. It is calculated on the American Experience 3-½ per cent. table of Union Central, or the 3 per cent basis of other companies, or whatever basis used; and the dividend addition is calculated by using this 3-½ per cent basis for a net single premium as a slight loading to care for expenses in handling it this way; therefore, if the dividend addition were surrendered within a year or two, immediately after the dividend addition was calculated, it often happens that the cash value of the dividend addition is slightly less than the dividend itself. There is a little expense loading used in calculating the dividend addition.

Q. The company did not calculate expense loading on extended insurance?

A. No, sir. That is a non-forfeiture option.

Q. Then it is true, isn't it, that the amount of the 1931 dividend of the policy involved in this
182 lawsuit, if added to the policy reserve or included in the policy value, would have augmented the policy value so that the difference between the augmented policy value and the indebtedness at the date of default was enough to provide for extended insurance until after October 15, 1931?

A. Yes, sir.

Q. And it is true that the same result follows by substracting the amount of the dividend from the indebtedness?

A. Yes, sir. It would carry the extended insurance beyond October 15, 1931—quite a few months beyond.

I am in charge of the department that directs the disposition of dividends. I had something to do with the disposition of the dividends made on this particular policy involved in this lawsuit only in so far as I have charge of the department, and know what disposition has been made in this particular case. I knew about the checks of September 9, 1931, and September 28, 1931, sent out by the company, relating to the dividents. I did not see the correspondence at the time, but have since seen such correspondence. Mr. Cary examined the correspondence. He had charge of the dividend division under my direction. He is one of the division heads of the Actuary Department. He follows rules laid down by the heads of the department and by the company and then gives orders according to those directions.

I have since examined the correspondence relating to the dividends, and all of them refer to or are somewhere connected up with an O. K. by Mr. Cary.

I recall the letter to the company from Lee & Lee dated September 14, 1931, now in evidence. I talked with Mr. Cary about it. Mr. Cary read that
183 letter.

Q. And you knew then, and Mr. Cary knew at the time that he authorized this money to be paid to Lee & Lee, that P. H. Williams had at all times since June, 1931, wished and desired those dividends on this policy in controversy here to be used in carrying that policy as far as—every nickle should be used in carrying the policy as far as it would go?

A. Any method to do that would involve the question of payment by him, and it was explained to him fully how much cash he had to pay in order to carry the policy on.

Q. Did you send any notices to Mr. Williams explaining to him how this money could be used to carry on his insurance?

A. Yes, sir, the form sent out to him showed him exactly how much he has to pay in order to carry on the insurance, and it is furthermore stated on the letter how much he would have to pay if he wanted to change it to a quarterly basis.

Q. Have you a copy of the letter that you sent to Mr. Williams?

A. I think it is in the file.

Q. I believe I was asking about any explanation that you made to Mr. Williams about these matters.

A. The letter I refer to was sent by us to Lee & Lee, our general agents, for them to use as a basis for their correspondence with Mr. Williams.

The Company did not write to Mr. Williams; we wrote to Lee & Lee a letter dated July 15, 1931. I don't think I have any more correspondence here about the same matter.

Yes, we told Lee & Lee to explain to P. H. Williams its rights with reference to those dividends. We said: "Please explain carefully that voucher instruction." That is what it says on the form.

184 We have a usual routine to go through. I don't know whether we went through this routine, because I haven't all the papers. After policies lapse, in trying to reinstate them, we offer inducements and write letters in order to induce the policyholders to reinstate the policies. We gave Lee & Lee the actual figures in this particular case in order to enable Lee & Lee to write intelligent letters to the insured. Such letter was sent on July 15, 1931, to Lee & Lee with reference to this policy involved in suit.

Q. Now, it is true as late as August the Company was wanting P. H. Williams to pay some interest on the indebtedness of the policy, isn't it?

A. Yes, sir, we wanted him to reinstate the policy. We make all effort possible to reinstate the policy. Of

course, that requires the payment of interest and some premium, and you accept the note for the difference, etc. We always make that effort to reinstate any lapsed policy.

Perhaps we did not write to P. H. Williams directly. We depended upon Lee & Lee to do that. We ordinarily would. The Company itself would look to Lee & Lee to make the arrangements. I didn't personally know that Charles A. Poteet was the local agent of the Company at San Angelo. I can't know every agent. By looking at the application for the policy I would have found Charles A. Poteet's name given on the application. We did not write Mr. Poteet direct; we deal with the general agent.

The 1931 dividend on the policy in suit was $74.80. The surrender charge was $6 per thousand, or $60.

Q. In other words, that surrender charge at $60 was the sum the Company was deducting from the reserve of the policy when the policy became converted into extended insurance?

185 A. Well, the policy never became converted to extended insurance; it was deducted before it was determined whether the policy had any extended insurance.

Q. Well, that deduction of $60 was $14.80 less than the amount of the dividend, wasn't it; in other words, the dividends exceed your surrender value charged by $14.80?

A. Yes, sir.

Q. Now, that surrender value charge is a charge made in cash against the insured?

A. No, sir, it is not made in cash; it is a deduction.

Q. From the reserve—cash reserve?

A. In order to determine the tabular cash value of the policy.

Q. Now, when you read that policy to determine his right, did you read that clause in it: "In the event of

lapse the value of this policy shall be applied as set forth in Article 16"?

A. Yes, sir.

Q. And you knew at that time that the 1931 dividend was in the hands of the Company?

A. At what time?

Q. At the time you were determining whether or not he had any extended insurance.

A. Yes, we knew that—that P. H. Williams had not drawn that money down.

Q. You saw Lee & Lee's letter?

A. Yes, sir. I saw that letter, and knew that Williams wanted to reinstate the policy if he could; but he had to act.

186 Re-Direct Examination.

Yes, I have that July letter to Lee & Lee referred to in cross examination. This is the letter, with the address at the bottom, and the date.

Thereupon, the letter just identified by the witness Arthur J. Koeppe was offered in evidence by the defendant, and reads as follows:

"The Union Central Life Insurance Company Surrender Value of Policy No. 940457 on the life of Peter H. Williams.

Cash Value of Policy as of 6-10-31	$910.00
Cash Value of Reversionary Additions ($..)	
Cash Value of Dividend Deposit including interest	
Cash Value of Dividend due 6-10-31 less discount	74.80
Total	$984.80

Deductions: Policy Loan $848.00
Loan Interest 6-10-30 to 6-10-31 $50.88
Premium Note Due $.....
Prem. Note Interest to $.....
No. 989 358 balance on loan—$81.10
Total Deductions $979.98

Net Cash Surrender Value available to 7-10-31 ..... $ 4.82

Premiums Paid to 6-10-31.
Policy in force.
4 years Insured born 12-10-75.

Maximum Loan Values (pledging Reversionary Additions if any) on ..... $.....
Premium due ..... $....

Deductions: Less Dividends $.... & Discount $..... $..... $.....

187 Indebtedness (if any) as shown above $.... $....
Interest (discounted) on new loan to $.... $....
Balance in cash due on ..... $.....

Paid-up value (gross) on .... $.... paid up value (net) on .... $.... Will sustain indebtedness of $.... Canceling indebtedness of $.....

Enclosures —3-A.

Signatures:—insured as Peter H. Williams—return renewal to auditor—

Please explain carefully the voucher instructions to the payee.

Remarks—It is assumed the Agent will use every effort to prevent surrender suggesting, if necessary, the loan and paid-up alternatives.

Cash value of additions or dividend deposit is payable without voucher if no item to be deducted.

Loan may be paid off by partial payments.

Dividend Deposit cannot increase loan value.

To agency of Lee & Lee.

Dated 7-15-31.

S. T. Brading, Manager, Surrender Division.

(p.2) The Union Central Life Insurance Company.

Cash Surrender Voucher.

The Union Central Life Insurance Company is hereby requested and authorized to make payment as follows in full satisfaction of all claims under the said policy, and the said policy is hereby surrendered to the said Insurance Company for cancellation and discharge.

Surrender value of policy No. 940457 on the life of Peter H. Williams..

Cash Value of Policy as of 6-10-31	$910.00
Cash Value of Reversionary Additions ($..)	
Cash Value of Dividend Deposit including interest	
Cash Value of Dividend due 6-10-31 less discount	74.80
188 Total	$984.80

Deductions: Policy Loan $848.00
Loan Interest, 6-10-40 to 6-10-41 50.88
Premium Note due
Premium note interest to
No. 989 158 balance on loan 81.80
Total Deductions $979.98

Net Cash Surrender Value available to 7-10-41 ..... $ 4.82

Caution:

Payment of the said net cash surrender value above indicated is to be made to the said insured unless otherwise instructed in writing below on the line marked *

* Name (of payee other than insured) ..... $.....
Address .....
Name (of Payee other than Insured) ..... $.....
Address .....

For the purpose of obtaining the cash value, each of us declares that he or she has made no assignment of said policy, and that no petition that he or she be adjudged a bankrupt has ever been filed by or against him or her.

Date at ..... this ..... day of .... 19..

..... (Seal)
Insured.

..... (Seal)
Beneficiary.

..... (Seal)
Assignee."

.....
Witness.

.....
Witness.

.....
Witness.

The Court:

I have allowed the letter in, not with any thought that it was binding on Mr. Williams, or is binding upon Mrs. Williams. It is merely for the cross examination conducted by the Plaintiff.

189 27

J. P. WILLIAMS, a witness for the plaintiff, testified substantially as follows:

I am a son of P. H. Williams. I recall bringing to Mr. Gibbs' office some letters or mail last fall after my father's death. During the day before my father died on the night of October 15th, I went out to the farm house and gathered up all of the insurance papers I could find, the letters and everything pertaining to insurance. In the bunch was the letter already in evidence, from The Union Central Life Insurance Company to my father, dated October 7, 1931. The envelope had not been opened at the time, and I opened it.

I recall bringing my father in from the ranch. It was on September 19th that I went out and got him. He had had his teeth pulled the day before I went out and got him. I was driving my father's car. My father did not have a car out at the farm at the time. No one else had a car out at the farm at that time. There were two other houses on the farm besides the one my father lived in. Jordan lived some of the time in one about a mile west from my father's house, and about a mile west of that was another house, that they were using for a barn.

Cross Examination.

The letter that I opened up was addressed to my father in care of the Central Hotel at San Angelo.

The letter had been redirected to Tankersley, Texas. My father was at the Central Hotel at San Angelo at the time.

190 28.

The foregoing twenty-seven sections of this bill of exceptions comprise a full and true statement of all material facts proven or agreed upon and of all material evidence introduced.

29.

Upon the conclusion of the evidence, the defendant, in writing, requested the Court to charge the jury in words as follows:

Charge requested by defendant.

"Under the competent and admissible evidence offered in this cause, the plaintiff is not entitled to recover on the policy in suit, in its original form or in any other form of insurance upon the life of Peter Hardy Williams, and you will now return a verdict for the defendant."

The Court refused to give the said charge, and to this action of the Court the defendant excepted.

General charge of the Court.

The Court gave to the jury a general charge, in words as follows:

"Gentlemen, of the jury, as you have already learned from service here, the Court takes the liberty of instructing orally since it assists us in the conservation of time. That being the method followed it is highly im-

portant that the Court speak so slowly and, I trust, so intelligently, that you may understand what the Court conceives to be the law applicable to the case, as you will have no written memorandum to which you may refer as to what the charge was.

"I try to make the work of the jury as light as I am permitted. You realize that the Court functions within a legally prescribed limit, and may not go out of that limit to invade the province of the jury,
191 any more than the jury is permitted to go outside of its limit in the determination of a case. Controverted questions of fact are for settlement by the jury. The settlement of such controverted questions of fact are made by the jury in and under the light of such law as the Court is bounden to and does, in fact, charge.

"So within this circumscribed limit in which the Court may operate, I take the liberty of bringing the case down so that I trust your labors will be as easy as, under the circumstances, they may be made.

"The suit is instituted upon an insurance policy for ten thousand dollars, alleged to have been issued by the defendant. The plaintiff sues for the face of the policy, for the statutory penalty provided for by the laws of the state of Texas, to-wit: Twelve per cent, for reasonable attorneys' fees, and, for six per cent interest on the face of the policy.

"The attorneys have assisted us in the simplifications of the questions at many angles. One of those agreements is to the effect that if and when there should be a finding for the plaintiff on this policy that then, and in that event—and this stipulation will not prejudice you in any way in passing upon the first matter—the attorney's fees shall be one thousand dollars; but, you discover, of course, that the stipulation means you must first find for the plaintiff.

"The defendant says, in answer to this suit, against it, in substance, and, I am merely speaking in sub-

stance terms in order to point you to what I conceive to be the matters for your settlement, that it did issue this policy to the deceased, Williams the husband of the plaintiff here, but, that it issued it in the form of a written contract, between it and Mr. Williams. That that contract provided, in substance, that for
192 the sum of approximately four hundred fifty dollars; it is a little less than that, four hundred forty-nine dollars and something in the sum of four hundred fifty dollars, we will say, paid each year, in advance, during the life of the contract; that it would insure him for the sum of ten thousand dollars. That the payment of these premiums were a condition to the life of this contract. If the payments were not made then the contract ceased to exist.

"It alleges that these premiums, or this premium due for the year 1931, on June the tenth of that year, was not paid, and that, therefore, the contract and policy lapsed.

"The plaintiff in turn says that by the terms of the agreement of the contract between Williams and the defendant there were certain accumulated values to which he, Williams, was entitled, and that that, or those, accumulated values would have kept his policy in force, and did, in fact, keep it in force up until the time of his death, and that it was in force at that time.

"The defendant denies that situation and further adds that while there was an accumulation of dividends in the sum of approximately seventy-four dollars due him, that amount he authorized to be paid to Lee & Lee, to whom he owed a sum of money, that sum of money being for a premium which Lee & Lee had paid for him on that same policy, and others, in the year 1930.

"The Plaintiff returns to the field and says that it is true that those payments were made, or, that that payment was made to Lee & Lee of the sum of seventy-

off dollars as earned dividend, by Williams, but that at the time of the payment of that seventy-off dollars, Williams was mentally incapable of so ordering it — that is, that he was a crazy man, insane.

"The Plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it, as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. If she has not done that, then the defendant is entitled to a verdict. If he has done that, then she is entitled to a verdict. Appropriately, just here, you say to the Judge, 'What do you mean by a preponderance of the testimony?' And the Judge charges you that that does not mean number of witnesses, but it means the condition of the impartial juror's mind after having heard the law and the facts, whereby it turns unmistakably in the direction of the plaintiff. I have found it somewhat effective, though rather crude, to illustrate this particular legal axiom by making use of the illustration of the scales. You have seen these little scales that are in apothecary shops, or drug stores, having two pans that are suspended by chains, or something, from a little beam at the top.' When the scales are awaiting use by the merchant in weighing goods to the customer, each pan is opposite the other. There is not a tilt either way; it is a fair scale. That is the condition of the juror's mind when he takes his seat in the jury box. He does not know anything about the matter. He is free, fair, openminded judge of the facts, and there he sits. If that is the condition of his mind at the conclusion of the testimony and the hearing of the law, then the defendant must recover. If the scale tips in the defendant's way, then the defendant must recover. If it tilts in the way of the plaintiff, that may be called a preponderance of the testimony; then the plaintiff is entitled to recover. What makes it tip in one direction

or the other is something that the juror, under his oath and quickened conscience, must determine and settle.

"Contracts, gentlemen of the jury, must be
194 read by the Court for the jury. We do not expect our juries to be learned in law, and they are not required to read contracts, ordinarily. Therefore, the burden is on the Court, and the Court in your absence has heard learned counsel concerning this contract in the effort to draw from it what it really means and what it really meant. And, with reference to the contract, in addition to what I have already said to you, I charge you that it provides, in substance, for the payment to this man, upon his death, that is, to his beneficiary, the sum of ten thousand dollars, provided the premiums are paid.

"I charge you that under the uncontroverted evidence the premium for the year 1931 was not paid. I charge you that, in the wording of the contract itself, there is a provision called section 22, which provides, in short and in part, that extended insurance shall be for the face value of the policy, less the indebtedness and advances, and for such term as said reduced cash value will provide.

"That in connection with that particular paragraph there is a table in the policy which sets out the length of such extensions, etc., and so on.

"I charge you with reference to that, that the advances and loans made to Mr. Williams have eaten up, or did eat up, all such right of extension of insurance under those paragraphs.

There is also an option one, and an option two, option one reading, in part, as follows: 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.'

"I charge you that the seventy-odd dollars dividend due Williams on the tenth of June, 1931, under the agreement of the defendant, if available for the purchase of extended insurance, would have been sufficient to have carried the insurance in force beyond the time of the insured's death.

"The Court holds that under these two options that I have read, the unearned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now think with me carefully: Was that done in this case? Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff; if you find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was in truth and in fact an instrument given for the transfer of that particular dividend to Lee & Lee on the note which Mr. Williams owed Lee & Lee for the premium that was paid by them on the year before. But no one may make such a contract as that, or any contract for that matter, unless he is in his right mind. If he was not in his right mind at the time, or if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee & Lee; and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case, he ordered, and was entitled to have that dividend purchase extended insurance.

"I charge you, Gentlemen, that persons are presumed to be mentally capable of making contracts which they do make. There is a presumption of law that every man is sane. When the sanity of one is attacked, under circumstances such as the plaintiff does here, then that

proof must be plain and clear and must carry
196 conviction to the degree I have indicated to
the triers of the facts. In looking at that matter and for that matter you may take into consideration, of course, and must take into consideration, and will take into consideration, all of the evidence surrounding that particular question.

"Physical incapacity does not mean mental incapacity. One might have all of his teeth extracted and be never so weak physically and yet be intensely strong mentally, of this we do not need to point an illustration, but we may look across the seas to Mahatma Gandhi; perhaps no weaker human is living, and yet no one would accuse him of mental incapacity.

"Physical weakness may be taken into consideration in determining resistence, power to carry forward one's own ideas. But, as I have said, you will bear in mind, all the time, this presumption of sanity.

"If you find that Mr. Williams, at the date of executing this order to Lee & Lee to collect these dividends which were due him, Williams, and, thereby apply them upon the debt which Williams owed to Lee & Lee, knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff.

You, Gentlemen, are the exclusive judges of the weight of the testimony and the credibility of the witnesses.

"There is not any more meaningful paragraph in a charge than that. You are entitled to take into consideration the interest of the witnesses; their freedom or hesitancy in disclosing, or in withholding, testimony that might be favorable or unfavorable to their particular sides. In truth, you place the searchlight of
197 your own good and discerning judgment against and upon those who testify in order that you may be able to deduce the truth.

"Write your verdict, please, upon a form which the clerk will give you, saying, "We, the jury, find for the plaintiff in the sum of ten thousand dollars, plus six per cent interest from January 1, 1932, plus one thousand dollars attorney's fees, plus twelve per cent penalty,' if you find for the plaintiff. Or, 'We, the jury, find for the defendant, 'if you find for the defendant. Those are the two forms of your verdict.

30.

After the Court had charged the jury, and before the jury had retired to consider of its verdict, the defendant took exception to the charges given by the Court, as follows:

Mr. Randolph:

If the Court please, we wish to make an exception to the charge as a whole, as being contrary to the provisions in the policy, providing that if the policy lapses the dividend shall be payable in cash, and as permitting the use of those dividends for the purchase of extended term insurance, contrary to the valid provisions of the policy.

We wish to except to the charge as a whole as not taking into account the indebtedness against the policy, as a deduction from the amount of the insurance that might, under the charge of the Court, be found to have been purchased for extended insurance.

The Court:

No, I told them specifically that all of the loans and deductions had evened up all of that, and that there was nothing to be had unless they found it from the dividends.

Mr. Randolph:

I thought the form of the verdict would be, 'We find for the sum of ten thousand dollars, plus attorneys' fees and interest.'

198 The Court:

Are there some amounts to come off of that?

Mr. Randolph:

Policy loan of $800, plus interest from June 10, 1930.

The Court:

Add to your verdict, Gentlemen, if you find for the plaintiff, after saying 10 per cent. plus 6 per cent. from January 1, 1930, plus one thousand dollars attorneys' fees, plus 12 per cent. damages then merely add this phrase: "Less the amount of any loan and interest due the company." The attorneys can then figure the verdict. If you find for the defendant, merely say: "We, the jury, find for the defendant."

Mr. Randolph:

We wish to except to that portion of the charge which, under the charge, will permit the jury to find on attorneys' fees, for the recovery of attorneys' fees, on the ground that the statute with reference to attorneys' fees is unconstitutional; also, on the ground that the provisions in the statute with reference to the recovery of attorneys' fees, or penalties, were not complied with in this case.

I wish to extend my exception to include both penalties and attorneys' fees.

We wish to except to that portion of the Court's charge with reference to accumulation of dividends, on the ground that the undisputed evidence shows that there was no accumulation of dividends and that merely there was one dividend declared in 1931, with reference to which certain options accrued on and after June 10, 1931.

We wish to except to that portion of the charge of the Court which was, in substance, that the plaintiff, if she established certain things, including the issuance of the policy, and some other documentary evidence and facts, and including that if the plaintiff established by a preponderance of the evidence the insanity of the insured, at the time of the transaction of September 18, 1931, that then the plaintiff would be entitled to a verdict, as being contrary to the evidence and contrary to the provisions in the policy, the valid provisions of the policy which provided if the policy lapses the dividend shall not be used for the payment of insurance, but, for cash that it should be paid in cash.

We wish to except further to the charge of the Court, with reference to the accumulation of dividends to the effect that accumulation of dividends at interest may be applied to the purchase of extended insurance that the $70 dividend in this case, under the agreement of the defendant, if available for the purchase of extended insurance, would have been sufficient, etc., to carry the insurance in force, for the reason that there is no evidence of any accumulation of dividends at interest, and the evidence all of the evidence is to the contrary, that there was no accumulation of dividends at interest.

We wish to further except to the charge of the Court that the dividend may be used for the purchase of extended insurance, for the reason that the policy, properly construed, expressly provided, and the insured expressly agreed, that if the policy lapsed the dividend should be paid in cash, and for the reason that there was no provision in the policy that said dividend might be used for the purchase of extended insurance, there being no option to that effect.

We wish to except to that portion of the charge which was to the effect, "Did the insured use his dividend to purchase extended insurance; if you find he did, then you will find for the plaintiff," for the reason that there is no evidence that the insured so used his dividend, or not sufficient evidence to submit such issue to the jury; and for the further reason that such issue as submitted would be contrary to the express policy provisions already mentioned with reference to the use of dividends if the policy lapses.

We wish to except to the portion of the charge to the effect I may have misunderstood the charge in this respect "You will determine whether, under all of the circumstances, he was entitled to use the dividend as extended insurance," for the same reasons; that the policy provides otherwise with reference to the use of dividends, that is to say, that if the policy lapses the dividends shall be used in cash; and such provision is valid.

We wish to except to that portion of the charge as follows, in substance: "If you find that Williams made such order and did not know what he was doing, then you will find for the plaintiff," for the reason that the submission of such issue is contrary to the evidence, there being no basis in the evidence for the submission of such issue, and for the reason that it is contrary to the provisions in the policy to the effect that if the policy lapses the dividend shall be paid in cash, and there being no provision in the policy for the use of the dividend for the purchase of extended insurance.

We object to the submission of any issue of mental incompetency to the jury, on the ground that the evidence is insufficient to justify such submission.

We except to that portion of the charge which expressly or impliedly indicates that the insured had the right, under the policy, to the use of the dividends for the purchase of extended insurance, for that the same is contrary to the evidence and to the valid provisions of the policy.

201 We except to that portion of the charge that expressed or implied that Williams did exercise any right, in any way, to use dividends for the purchase of extended insurance, because there is no evidence of any such exercise or application.

We further except to all portions of the charge that expressed or implied that Williams exercised such right within the time specified for the exercise of such right in the policy.

We further object to that portion of the charge which will permit, under any circumstances, a recovery of attorneys' fees, in the sum of one thousand dollars; the stipulation was that the attorneys' fees, if recoverable, might be 10 per cent. of the primary recovery, which would be the amount of the insurance less the indebtedness.

The Court:
Very well, I did not understand it that way. I understood that you had agreed upon $1,000— 10 per cent. of ten thousand dollars.

Mr. Randolph:
Ten per cent. of the net sum of ten thousand dollars, less the indebtedness against the policy.

The Court:
So, in that respect, gentlemen of the jury, if you find for the plaintiff upon the issues that the Court has submitted to you, you will find for the plaintiff for ten

thousand dollars, less the amount due the defendant for a loan and interest, approximating something over eight hundred dollars. You will say, "less the amount due the defendant," and the attorneys will understand from that what that means, "plus ten per cent attorneys' fees on such amount," after deducting the amount due the defendant for a loan and interest from the ten thousand dollars, plus ten per cent penalty under the statute, plus six per cent interest from January the first, 1942. I will try and take a
202 sheet of paper and ~~give~~ you those amounts, so that in the event your verdict is that way, after all of this discussion here, you will not be at a loss as to what it means. I will send it to you by the marshal.

(The jury retired.)

The Court:

I would like for the record to show that the Court was given no special charge, no amount and nothing at all, and after the Court had instructed the jury, then this volume of argumentative exceptions was made in their presence.

Now, Gentlemen, I have written this further instruction and I will send it to the jury room by the marshal, all this having taken place outside of the jury's presence:

"If you find for the plaintiff, you will say: 'We, the jury, find for the plaintiff in the sum of $9,101.12, plus $910 attorneys' fees, plus 12 per cent penalty, plus 6 per cent. interest from January 1, 1942'. If you find for the defendant, simply say: 'We, the jury, find for the defendant.'

I am sending that to the jury room.

You would be entitled to a little more interest than that, but I thought that January 1, 1932, would be a good date to start from. Is that satisfactory?

Mr. McGowan:
Yes, sir.

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The defendant presents the foregoing as its bill of exceptions in the above styled cause, and prays that it be settled and allowed, and duly signed and made a part of the record of the cause.

LOCKE, LOCKE, STROUD & RANDOLPH,
EUGENE P. LOCKE,
RALPH RANDOLPH,
Attorneys for Defendant.

204 The time for the settling and allowance of the defendant's bill of exceptions having been extended by order of the Court made during the term, and immediately upon the conclusion of the trial, and the period of such extension not yet having elapsed, and the foregoing bill of exceptions having been examined and found correct, the same is hereby settled, allowed and ordered filed as a part of the record of the cause, this the 19th day of November, 1932.

WM. H. ATWELL,
United States District Judge
presiding.

204 "PETITION FOR APPEAL."

Filed Jan. 4, 1913

(Title Omitted.)

To the Honorable, the Judges of the District Court of the United States for the Northern District of Texas:

Now, by its attorneys, comes The Union Central Life Insurance Company, the defendant in the above styled cause, and shows that in this Court there was rendered against it in said cause on, to wit, October 24, 1912, a money judgment in favor of the plaintiff, Mrs. Nannie May Williams, in the principal sum of $11,812.78, together with interest thereon from the date thereof at the rate of 6 per centum per annum, and together with the plaintiff's costs of suit. The said judgment was dated October 24, 1912, and signed on such date, but was entered as of October 21, 1912.

On October 27, 1912, the defendant filed its motion for new trial, and on said date the Court entered an order overruling and denying such motion for new trial, and thereupon the said judgment became a final judgment of the said Court.

Wherefore, feeling itself aggrieved by said judgment and the verdict upon which the same was rendered, the defendant files with this petition an assignment of errors complained of, and prays that an appeal may be allowed to it by order of the Court from the
205 said judgment, to the United States Circuit Court of Appeals for the Fifth Circuit. This petitioner further prays that the order of Court allowing the appeal also fix the amount of security which the said petitioner shall give and furnish upon such appeal, and shall provide that upon this petitioner's giv-

ing such security, all further proceedings in this Court be suspended and stayed until the determination of the said appeal by the said United States Circuit Court of Appeals.

LOCKE, LOCKE, STROUD & RANDOLPH,
RALPH RANDOLPH,
Attorneys for Defendant.

Allowed this 4th day of January, 1933.
E. R. MEEK,
United States District Judge for the Northern District of Texas.

"DEFENDANT'S ASSIGNMENT OF ERRORS."

206 Filed Jan. 4, 1933.

(Title Omitted.)

In connection with its petition for an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the judgment of this Court, this day filed in the above styled cause, the defendant, The Union Central Life Insurance Company, assigns the following errors which it says occurred in the trial of the said cause in the said District Court.

1. The Court erred in refusing to give to the jury the defendant's specially requested charge directing a verdict for the defendant.

2. The Court erred in not setting aside the verdict of the jury and in rendering judgment thereon, for that the evidence offered on the subject of mental incom-

petency of Peter Hardy Williams at the time of the execution, on September 18, 1931, of the order directing the defendant to pay to Lee & Lee the amount of 1931 dividend was insufficient to warrant the submission of such issue to the jury.

3. The Court erred in not setting aside the verdict of the jury and in rendering judgment thereon, for that the evidence offered was insufficient to warrant the submission to the jury of any issue of any right of Peter Hardy Williams, or of the exercise by Peter Hardy Williams of any right, to use the dividend of June 10, 1931, in the purchase of extended term insurance.

207 4. The Court erred in giving to the jury the instructions indicated by the underscoring in the following quotation quoted totidem verbis from his charge to the jury:

"The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * If she has done that then she is entitled to a verdict.

* * * *

"There is also an option one, and an option two. Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid up insurance.'

* * * *

"The Court holds that under those two options that I have read, that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now think with me carefully was that done in this case? Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff. If you find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was in truth and in fact an instrument given for the transfer of that particular dividend to Lee and Lee on the note which Mr. Williams owed Lee and Lee for the premium that was paid by them on the year before. But, no one may make such a
208 contract as that, or any contract for that matter, unless he is in his right mind. If he was not in his right mind at that time, or, if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee and Lee, and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case he ordered, and was entitled to have that dividend purchase extended insurance.

* * * *

"If you find that Mr. Williams, at the date of executing this order to Lee and Lee to collect these dividends, which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee and Lee, and that he knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plain-

tiff." For that such charge expressly or impliedly indicates, but erroneously indicates, that the insured had the right, under the policy, to the use of the 1911 dividend for the purchase of extended insurance, and for that the same is contrary to the evidence and to the valid provisions of the policy which established that if the policy should lapse for the nonpayment of the premium, as it did lapse for the nonpayment of the January 10, 1911, premium, that the dividend then due should be paid in cash.

Assignment 5. The Court erred in giving to the jury the instructions indicated by the underscoring in the following quotation, quoted totidem verbis from his charge to the jury:

"The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony * * * If she has done that, then she is entitled to a verdict.

"There is also an option one, and an option two. Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid up insurance.'

"The Court holds that under those two options that I have read, that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now think with me carefully was that done in this case? Did the insured use his dividends to buy this

extended insurance? If you find that he did, then you will find for the plaintiff. If you find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was, in truth and in fact an instrument given for the transfer of that particular dividend to Lee and Lee on the note which Mr. Williams owed Lee and Lee for the premium that was paid by them on the year before. But, no one may make such
210 a contract as that, or any contract for that matter, unless he is in his right mind. If he was not in his right mind at that time, or, if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee and Lee, and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case he ordered, and was entitled to have that dividend purchase extended insurance.

. . . .

"If you find that Mr. Williams, at the date of executing this order to Lee and Lee to collect these dividends, which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee and Lee, and that he knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff." For that such portion of the charge expressly or impliedly indicates, but erroneously indicates, that the insured did exercise any right in any way to use dividends for the purchase of extended insurance, and for that there was no evidence of any such exercise or application within the time specified in the policy therefor, or in fact at all.

6. The Court erred in giving to the jury the instructions indicated by the underscoring in the following quotation, quoted totidem verbis from his charge to the jury:

211 "The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * * If she has done that, then she is entitled to a verdict

* * * *

"There is also an option one, and an option two Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid up insurance.'

* * * *

"The Court holds that under those two options that I have read, that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now think with me carefully was that done in this case? Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff. If you find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was in truth and in fact an instrument given for the transfer of that particular dividend to Lee and

Lee on the note which Mr. Williams owed Lee and Lee for the premium that was paid by them on the year before. But, no one may make such a contract as that, or any contract for that matter, unless he is in his right mind. If he was not in his right mind at that time, or, if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee and Lee, and you will determine that particular question, and then you will determine the further question as to whether or not, under all of the circumstances of this case he ordered, and was entitled to have that dividend purchase extended insurance."

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. . . .

"If you find that Mr. Williams, at the date of executing this order to Lee and Lee to collect these dividends, which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee and Lee, and that he knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff." For that the portion of the charge quoted submits to the jury an issue of the insured's mental incompetency and to find for the plaintiff if it found the insured mentally incompetent, and for that the evidence was insufficient to justify the submission of such issue to the jury.

7. The Court erred in giving to the jury the instruction indicated by the underscoring in the following quotation totidem verbis from his charge:

"The defendant denies that situation, and further adds that while there was an accumulation of dividends

in the sum of $74 due him, that that amount he authorized to be paid to Lee & Lee, to whom he owed a sum of money.

* * * *

"There is also an option one and an option two, Option One reading in part as follows: 'Accumulation of dividends at interest may be applied to increase the term of extension of insurance.' Option Two, 'Accumulation of dividends at interest may be applied to purchase additional paid up insurance.'

* * * *

"The Court holds that under those two options that I have read that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance."

For that the undisputed evidence shows that there was no accumulation of dividends and that merely there was one dividend declared in 1933, with reference to which certain options accrued on and after January 10, 1931.

8. The Court erred in giving to the jury the instructions indicated by the underscoring in the following quotation totidem verbis from his charge:

"The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. If she has not done that, then the defendant is entitled to a verdict. If she has done that, then she is entitled to a verdict."

Which is the first paragraph of the charge quoted in Assignment No. 1, for that such instruction was contrary to the evidence and contrary to the valid provisions of the policy, which provide that if the policy lapses the dividend shall be used for the payment of insurance, but for cash that it should paid in cash.

9. The Court erred in giving to the jury the instruction contained in the following quotation totidem verbis from his charge:

214 "The Court holds that under those two options that I have read, the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance." (which is from the third paragraph in the quotation from the charge in Assignment No. 4) for that the policy, properly construed, expressly provided, and the insured expressly agreed, that if the policy lapsed, the dividend should be paid in cash, and for that there was no provision in the policy that the said dividend might be used for the purchase of extended insurance, there being no option to that effect.

10. The Court erred in giving to the jury the instruction contained in the following quotation totidem verbis from his charge:

"Did the insured use his dividend to buy this extended insurance? If you find that he did, then you will find for the plaintiff." for that there is no evidence that the insured so used his dividend, or the evidence is not sufficient to warrant the submission of such issue to the jury, and for that such issue, as submitted, would be contrary to the express policy provision providing that if the policy shall lapse the dividend shall be paid in cash.

11. The Court erred in giving to the jury the instruction indicated by the underscoring in the following quotation totidem verbis from his charge:

"If you find that Mr. Williams, at the date of executing this order to Lee & Lee to collect these dividends, which were due him, Williams, and, thereby apply them upon the debt which Williams owed
215 to Lee & Lee, and that he knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff." (Which is the last paragraph in the quotation from the charge contained in Assignment No. 4), for that the submission of such issue is contrary to the evidence, there being no basis in the evidence for the submission of such issue, and for that it is contrary to the provisions in the policy to the effect that if the policy lapses the dividend shall be paid in cash, there being no provision in the policy for the use of the dividends for the purchase of extended insurance.

12. The Court erred in admitting the evidence on behalf of the plaintiff as follows:

Question of the plaintiff's attorney propounded to the plaintiff's witness, Dr. F. S. White:

"Now, Doctor, please answer the question that I am about to propound to you, basing your answer thereto upon the following assumed state of facts: For several years prior to the year 1931, P. H. Williams was engaged upon a large scale in the oil business, including the drilling of wells. He was active and energetic, he was, generally speaking, of a sociable disposition, and even temperament. Prior to the year 1931, he suffered heavy financial losses, and became

despondent, and on at least one occasion he became so morose as to talk of suicide. In the spring and early summer of 1931 there was noticeable to some of those coming in contact with him, some lapse or loss of memory, relating to recent events. During
216 that portion of the year 1931, prior to August 16, 1931, which is the date of the accident, that will be hereinafter mentioned, he managed his farm in Irion County, Texas. He at times did work, as driving a tractor, handling cattle and general work about the farm. Prior to August 16th, 1931, he gave some signs of occasional indisposition, apparent to his wife, but was able to, and did work, involving physical labor occasionally, as hereinabove indicated. On or about August 16, 1931, while branding a bull yearling, he was kicked in the abdomen by that yearling, with such force as to knock him down. Thereafter, he did not do any work on the farm involving any material or appreciable physical exertion. He did give directions to the farm hands as to the work, but he was not able to bear in his memory from one day to another the directions so given. This being noticeable on a number of occasions; after the said accident, he complained of discomfort, and at times pain in the abdomen. When walking he stooped, and at times was observed holding his hands to his abdomen and side. He became short of breath; at any appreciable exertion he would gasp for breath. Hiccups and headaches developed shortly after the accident and continued intermittently until the time of his death. The hiccups continued to a few days before his death, when he suffered a hemorrhage after which hemorrhage he did not have hiccups. Both shortly prior to the accident, and after the accident, he was observed, on several occasions sitting in his car, stooped and bowed over the steering wheel, with his head downcast, being and remaining in such
217 position for periods of from 30 to 45 minutes, manifesting on said occasions no interest whatsoever in his surroundings. In the latter part of

August and early part of September, 1931, he went through clinical examinations, including laboratory urinalysis and X rays, at the San Angelo Medical and Surgical clinics. Abnormalities were evidenced, by casts, and some sugar was observed in the urinalysis, but not so as to definitely indicate the cause of his trouble. No positive or definite diagnosis was made by the physicians at the clinic, but the X rays and other findings suggested to the examining physicians and indicated to them that he had a serious disorder, involving the liver and perhaps the gall bladder, in their opinion either a condition of malignancy or cirrhosis. No condition of ascites or dropsy was noted during the period of said examinations, which extended until about the middle of September, 1931. X rays made of the teeth during said examination disclosed pus pockets in several teeth, and on September 17, 1931, in the morning of said day, all of his teeth, some fourteen in number, were extracted. A local anaesthetic, with the dental blocking technique, was used. The operating dentist noticed that several teeth had pus pockets at the roots, and further noted a condition of ankylosis, in bone tissue, and a deterioration of bone tissue. In the afternoon of said day of September 17, 1931, the said P. H. Williams went from San Angelo, where the dental operation had been performed, to his ranch or farm in Irion County, Texas, a distance of some 20 miles, being taken there in a car. Upon his arrival there he went to bed, and spent a restless and practically sleepless night, his gums bleeding all during the night, and practically throughout the night, his condition of restlessness being such that his groaning was noticeable to a farm hand sleeping in the next roof to the room adjoining the one in which Mr. Williams was sleeping noticeable at times during the night. On the morning of September 18, 1931, the said P. H. Williams did not eat any breakfast. He appeared to be to those at the place and

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so stated to them, weak and sick. His gums continued to bleed intermittently during the early morning of said date of September 18th. During the preceding night he had had fever. He had some fever during the early morning of September 18th. He had fever in the afternoon of September 18th a little higher than it had been early in the morning, the fever in the morning being 2 degrees, or thereabouts, above normal, and in the afternoon being something like 2 degrees above that in the morning. He did not eat any dinner. He was in bed most of the early part of the morning of September 18th, and sat up during part of the morning of September 18th, in a chair in the room joining the bedroom. In the afternoon of September 18th he grew weaker. He had been given Aspirin while at his house to relieve his suffering and discomfort. In the afternoon or early in the evening or night of September 18th he became, to those surrounding him, to his wife, so weak and his gums bleeding so much that she returned with him to San Angelo, to the Central Hotel, arriving there in the night of September 18th. He remained in the Central Hotel from September 18th to the date of his death. From the night of September 18th until the date of his death, his death occurring on October 15, 1931, he was not, during all of that period, in bed; part of the time he was in bed; and part of
219 the time he would sit upon the bed. At times between September 18th and the date of his death, for a few days after September 18th, his gums bled so much he had hemorrhages, and physicians had to be called, and morphine administered. On the night of September 18th he was again restless and sleepless. These hiccups were almost constant, with few intermittent periods between September 18, 1931, and the date of the hemorrhage, which preceded his death by only a few days. He complained during this period, between September 18th and the date of his death, of discomfort and pain in his abdomen, shortness of breath, being troubled so much that he had to be

propped up and had to sit up in bed with a pillow behind him instead of lying down. Now, he was able to go to see a doctor on or about September 30, 1931, able to walk to his office, to the doctor's office, that doctor being Dr. Marberry. Dr. Marberry found, upon examination, when P. H. Williams first came to him in the latter part of September or at the last of September, a marked condition of ascites or dropsy, and found by manipulation and examination that the liver was abnormally small. His diagnosis was cirrhosis of the liver. The prognosis was very unfavorable, he stating that he saw nothing could be done to save him. The only thing that he undertook to do was to try to alleviate, to some extent, the discomfort produced by this dropsy,— alleviating that by injecting a needle in the abdomen and drawing off the fluid on several occasions, the amount of fluid running as high as two gallons. Dr. Marberry treated him once, perhaps twice, at the office. He went to see Mr. Williams at the hotel also, and performed this operation to alleviate his discomfort from the ascites. He said that no appreciable relief was obtained. Those who observed P. H. Williams noticed changes in him, physically and otherwise, and some noticed them at one time and some at another time, some placing the date early in the year 1931, some in the summer of 1931, some before, and some after the date of the accident in August, 1931. Dr. Nibling, one of the physicians in the clinic, noted that Wiliams was suffering from a serious disorder—such a disorder as to result in a toxic condition calculated and likely to influence or affect his nervous system and his mental powers; but Dr. Nibling stated that he did not observe unsoundness of mind. Those who were in contact with P. H. Williams and closely associated with him, observed marked change, both as to his physical condition and as to his mental condition, as hereinabove outlined, and as to his personality, and as to his characteristics; and

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these changes had been observed and noted prior to September 18, 1931.

Now, Doctor, basing your answer upon said assumed state of facts, please state whether or not in your opinion P. H. Williams, on September 18, 1931, had the mental power and capacity to weigh and understand and consider the nature and effect of a business transaction, assuming that all of those facts are true.

Answer: "I will answer that question assuming all of these statements are true; and assuming that, my opinion would be that he was not in a condition to know the nature and effect of the signing of the paper."

221 for that the sum total of the evidence introduced on the basis of which the hypothesis was stated was insufficient to form any basis for the framing of a hypothetical question to an alienist as to the mental capacity of P. H. Williams; for that the question, taken as a whole, was too vague and indefinite in detail to form any basis for the rendering of an opinion by an alienist; for that, taken as a whole, there was no basis in the testimony for the assumption of fact stated to the witness; for that the assumption in such question that Williams had suffered a loss or lapse of memory as to recent events was objectionable on the ground that there was no specification of the things not remembered or of the surrounding circumstances or of the dates of such matters; for that the assumptions in such question, as to some signs of occasional indisposition apparent to the wife as to material or appreciable physical exertion, followed at some vague and indefinite time by a lack of material or appreciable physical exertion on the part of said Williams; as to Williams' not being able to bear in his memory from one day to another directions given by him to people on his farm, as to Williams' at times holding his hands to his side, as to Williams' on several oc-

casions being observed sitting in his car, drooped and downcast, as to Williams', after going to San Angelo to consult doctors, being part of the time in bed and part of the time not, as to William's suffering a shortening of breath so much that at times he had to sit up and be propped up, were too vague and indefinite to form any basis for the expression of opinion by an alienist as to Williams' mental capacity; for that there was no basis in the testimony for the assumption of facts stated in the question with reference to Williams' not being able to bear in his memory from one day to another directions that he had given; for that
222 the assumption in such question with reference to certain witnesses having noticed a change in Williams' condition or a marked change in condition, mentally and physically, did not inform the alienist as to what the changes were; and for that in other respects, too numerous to mention, the question was too vague and indefinite, and for that in other respects too numerous to mention there was no basis for the testimony for the facts assumed.

13. The Court erred in giving to the jury the instruction indicated by the underscoring in the following quotation totidem verbis from his charge:

"Write your verdict, please, upon a form which the clerk will give you, saying: 'We, the jury find for the Plaintiff in the sum of $9,101.12 plus $910 attorneys' fees, plus 12 per cent. penalty, plus 6 per cent. interest from January 1, 1932'."

For that the state statute with reference to attorneys' fees and penalties is unconstitutional, and for that the provisions of such statute with reference to the recovery of attorneys' fees or penalties were not complied with in this case.

14. The Court erred in overruling the special exception filed by the defendant in his answer to the petition filed in this case with reference to the recovery of attorneys' fees and penalties.

15. The Court erred in rendering judgment for the plaintiff on the verdict of the jury.

16. The Court erred in overruling the defendant's motion for new trial for the reasons set forth in such motion.

Wherefore, for the reasons hereinabove assigned, the defendant prays that the said judgment in said cause be reversed by the United States Circuit Court of Appeals for the Fifth Circuit, and for such other and
223 further relief as to the Court may seem just and proper.

LOCKE, LOCKE, STROUD & RANDOLPH,
RALPH RANDOLPH,
Attorneys for Defendant.

AMENDED ASSIGNMENT OF ERRORS.

224 Filed January 14, 1933.

(Title Omited.)

With leave of the Court, the defendant, The Union Central Life Insurance Company, amends its assignment of errors heretofore filed on January 4, 1933, by amending paragraph 1 of the first assignment thereof so that the same shall read as follows:

1. The Court erred in refusing to give to the jury the defendant's specially requested charge directing a verdict for the defendant, with charge reads as follows:

"Under the competent and admissible evidence offered in this cause, the plaintiff is not entitled to recover on the policy in suit, in its original form or in any other form of insurance upon the life of Peter Hardy Williams, and you will now return a verdict for the defendant,"

for that the undisputed evidence showed that the policy sued on was not in force at the date of the death of the insured, Peter Hardy Williams, either in its original form, or in any other form of insurance on the life of the said Peter Hardy Williams.

LOCKE, LOCKE, STROUD & RANDOLPH,
RALPH RANDOLPH,
Attorneys for the defendant.

Leave to file the foregoing amendment given.

E. R. MEEK,
United States District Judge
Presiding.

225 "ORDER ALLOWING APPEAL."

Filed Jan. 4, 1933.

(Title Omitted.)

On this the 4th day of January, 1933, came The Union Central Life Insurance Company, the defendant in the above styled cause, by its attorneys, and presented its petition filed in said cause for the allowance of an appeal from the final judgment entered in said cause, and for fixing the amount of security to be given by the defendant upon said appeal and to operate as a supersedeas, and the said petition is hereby granted and the said appeal is hereby allowed; and upon petitioner's filing an approved bond in the sum of $15,-

000.00 and otherwise complying with the requirements of the law in such behalf, the same shall operate as a supersedeas of the judgment made and entered in the above styled cause and all further proceedings in this Court shall be suspended and stayed until the determination of the appeal by the United States Circuit Court of Appeals for the Fifth Circuit.

E. R. MEEK,
United States District Judge
for the Northern District of
Texas.

"SUPERSEDEAS BOND ON APPEAL".

226 Filed Jan. 5, 1933.

(Title Omitted:)

Whereas, in the above styled cause, then pending in the District Court of the United States for the Northern District of Texas, San Angelo Division, said Court, on, to-wit: October 21, 1932, rendered in the plaintiff's favor and against the defendant a money judgment for the sum of $11,512.75, together with interest thereon from the date thereof at the rate of 6 per centum per annum and together with plaintiff's costs of suit, such judgment being entered as of such date; and

Whereas the said defendant, The Union Central Life Insurance Company, has filed a petition for the alowance of an appeal from the said judgment to the United States Circuit Court of Appeals for the Fifth Circuit, and such appeal has been allowed by order duly entered;

Now, therefore, know all men by these presents: That the said The Union Central Life Insurance Company, a private corporation, domiciled in the city of San Antonio in the State of Ohio, as principal, and as surety, Great American Indemnity Company, a private

Corporation domiciled in the City, County and State of New York, and duly authorized by its charter and by compliance with the laws of Texas to execute judicial bonds in Texas, do hereby acknowledge themselves jointly and severally bound to pay to the plaintiff, Mrs. Nannie May Williams, and to her executors, administrators and assigns, the sum of $15,000.00.

227 The condition of this bond, however, is such that if the said The Union Central Life Insurance Company shall prosecute said appeal to effect and answer all damages and costs, then this bond shall become null and void. Otherwise, it shall remain in full force and effect.

In testimony whereof, the said The Union Central Life Insurance Company has caused these presents to be signed in its name and behalf by Locke, Locke, Stroud & Randolph, and Ralph Randolph, its attorneys of record and agents thereunto duly authorized, and the said Great American Indemnity Company has caused these presents to be signed and its corporate seal to be thereunto affixed by the undersigned attorney-in-fact thereunto duly authorized, at Dallas, Texas, this 4th day of January, 1933.

THE UNION CENTRAL LIFE INSURANCE CO.,
Principal.
By LOCKE, LOCKE, STROUD & RANDOLPH and RALPH RANDOLPH,
Its Attorneys of Record and Agents thereunto duly authorized.
GREAT AMERICAN IDEMNITY COMPANY,
Surety,
By DALLAS SMITH,
(Seal) Its Attorney-in-fact thereunto duly authorized.

The foregoing bond is examined and approved as a supersedeas bond and ordered filed this the 4th day of January, 1933.

E. R. MEEK,
United States District Judge
for the Northern District of
Texas.

"PLAINTIFF'S BILL OF EXCEPTIONS".

228 Filed Nov. 19, 1932.

(Title Omitted.)

Be it remembered that on the 20th and 21st days of October, 1932, the above styled cause came on to be heard before the Court above named, to-wit, before the Honorable William H. Atwell, United States District Judge Presiding, and a jury impaneled and sworn, Messrs. Charles Gibbs, H. O. Williams, Austin F. Anderson and H. T. McGown appearing as counsel for the plaintiff, and Messrs. Eugene P. Locke and Ralph Randolph appearing as counsel for the defendant.

Thereupon, after the pleadings had been settled, and after all the evidence had been adduced with the exception of Plaintiff's evidence in rebuttal, the following proceedings were had, insofar as the facts and evidence are material to this bill of exception.

Plaintiff offered in evidence as a part of her evidence in rebuttal separately two certain letters identified as plaintiff's Exhibit numbers 8 and 7, said letters being offered under the following circumstances:

Plaintiff had duly and timely given defendant notice to produce on the trial of this cause all letters, correspondence and communications between defendants' local agent at San Angelo, Texas, Chas. A. Poteet, and defendant's general agents at Dallas, Texas, Lee and Lee. Before plaintiff had closed, and before plaintiff had concluded her evidence in rebuttal, plaintiff's counsel in open Court requested of defendant's counsel

229 all such communications, letters and correspondence which plaintiff had given defendant notice to produce as aforesaid.

Thereupon, defendant's counsel handed plaintiff's counsel a folder or file containing voluminous papers, among which the plaintiff's counsel selected for offer two letters, each written on the letter head of The Union Central Life Insurance Company, and addressed to Lee & Lee, Dallas, and signed "Chas. A. Poteet", one of said letters being dated September 24, 1931, and one being dated October 2, 1931. The plaintiff contends that the signature of each of said letters was identical with, and was in the same handrwriting as the signature "Chas. A. Poteet" appearing upon the application for insurance, Part 1, which defendant had previously introduced in evidence, said application for insurance being identified as defendant's Exhibit "F". Said Exhibit "F" appears on pages 77 and 78 of defendant's bill of Exceptions.

The undisputed evidence in the case shows that throughout the year 1931, Chas. A. Poteet was defendant's local agent at San Angelo, Texas, and Lee & Lee were defendant's general agent at Dallas, Texas, Plaintiff contends that each of said letters was in the handwriting of Chas. A. Poteet.

Plaintiff offered in evidence each of said letters separately, whereupon defendant objected to their intro-

duction in evidence as not being in rebuttal, and made further the objection "No proof of execution":

The Court:
(After inspecting and reading said letters) "I do not think the letters are admissible; they are hearsay and not in rebuttal. There are some other reasons apparent from the letters; the Court does not think appropriate to say what they are at this moment."

230 Said letters in full are as follows:

The Union Central Life Insurance Co.
Chas. A. Poteet, Agent,
302 Rust Building.

Lee & Lee, General Agents,
Dallas, Texas.

San Angelo, Texas, Sept. 24, 1931.

Lee & Lee,
Dallas, Texas.
Gentlemen:

After Mr. J. E. Lee left out here I sent Chas. H. out to see P. H. Williams on Sept. the 10th Pete was sick and was sick the time Mr. Lee was here On Sept. 11th we went out again He was in town The next day I learned that he was under the care of Drs. I went to his rooming house to see him He was very pleasant I went to see him every day he appeared a little better, so I wrote him a letter and inclosed your letter which you sent me to be delivered to him. I went back next day to see him—Asked him if he got my letter—said he did—He & his wife were just starting out to his ranch—20 miles out—said he would be in Saturday to see me, but I did not see him—I learned yesterday that he got worse the next day at the ranch

and was back in town—His son said yesterday that he wanted to .... me. (I mean the son). I made an appointment with him but he did not show up. May see him today—I was up to see Pete this A. M. He is a pretty sick old man—He is in no condition to talk or worry about anything—I am going to see his son and it may be that his son will advise him to sign these surrender vouchers.—He cannot sign a health certificate nor furnish insurability—but if he will sign these vouchers and this Reinstatement certificate and let us off with the $15000. I would very strongly advise that as the best way out—Let me hear
231 from you.

Yours very truly,
CHAS. A. POTEET.

(Said letter bears reporter's notation at top "P Exhibit 8".)

The Union Central Life Insurance Co.
Chas. A. Poteet, Agent,
302 Rust Building.

Lee & Lee, General Agents,
Dallas, Texas.

San Angelo, Texas, Oct. 2, 1931.

Lee & Lee,
Dallas, Texas.
Gentlemen:

I have your letter to the effect that you got a settlement out of P. H. Williams—That is good and serves him right—I have not seen him for several days so do not know how he is feeling or will feel—I tried mighty hard to help him even though I lost money.

Yours very truly,
CHAS. A. POTEET.

There was attached to said letter dated October 2, 1931, and identified by reporter's "Plaintiff's Exhibit 7", newspaper clipping as follows:

Veteran Oil Driller Dies at San Angelo.

San Angelo, Tex., Oct. 15 (AP) Peter Harding Williams of San Angelo, 57, pioneer oil well driller, died here today after a year's illness. His career included the extension in 1927 of the Powell field in Crockett County, which he sold for $500,000.00 and the completion unaided, in Irion County last year of the world's deepest test for oil drilled with cable tools.
232 No. 1 Ash Bros., 8,900 feet deep. It was dry.

About twenty years ago Williams assisted in shutting in what was then the world's greatest oil well, No. 4 Patrero De Ono, in the Tampio Mexico field. A river was converted into a wall of fire thirty miles to the sea as the gusher ran wild for twenty-six days.

Williams owned ranches in Presidio, Tom Green, Yoakum and Dallas Counties. His widow, one son, one daughter and five brothers survive.

The Court excluded said letters, to which action of the Court in each instance plaintiff, in open Court, duly excepted, and now tenders and presents this, her bill of exceptions and prays that same be settled and allowed and duly signed and made a part of the record in this cause.

CHAS. GIBBS,
AUSTIN F. ANDERSON,
H. T. McGOWN,
H. O. WILLIAMS;
Attorneys for Plaintiff.

The time for the settling and allowance of bills of exceptions having been extended by order of the Court made during the term and the period of such extension not having yet elapsed, and the foregoing bill of exceptions having been examined and found correct, the same is hereby settled, allowed, and ordered filed as a part of the record of the cause this the 19th day of November, A. D. 1932.

WM. H. ATWELL,
United States District Judge
Presiding.

233 CERTIFICATE OF CLERK.

United States of America,
Northern District of Texas, ss.

I, GEORGE W. PARKER, Clerk of the District Court of the United States for the Northern District of Texas, do hereby certify that the foregoing pages numbered from 1 to 232, inclusive, contain a true and complete transcript of the record, bill of exceptions, assignment of errors and all proceedings had in said Court in the cause of Mrs. Nannie May Williams, plaintiff (now appellee), against The Union Central Life Insurance Company, defendant, (now appellant), numbered 269 on the law docket of said Court, as the same remains of record and on file in said cause, except the citation on appeal, the return thereon, and the acknowledgment of service of citation and waiver of further service, filed in said cause, the originals of which are included in and accompany this transcript. The plaintiff's bill of exceptions has been inserted at the request of the plaintiff, Mrs. Nannie May Williams, now appellee.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of San Angelo, in said District, this the 25th day of January A. D. 1933.

(Seal) GEORGE W. PARKER,
Clerk.
By JESSE T. COUCH,
Deputy.

Original Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 6871

THE UNION CENTRAL LIFE INSURANCE COMPANY

versus

NANNIE MAY WILLIAMS

ARGUMENT AND SUBMISSION

Extract from the Minutes of May 1st, 1933

On this day this cause was called, and, after argument by Ralph Randolph, Esq., for appellant, and H. O. Williams, Esq., for appellee, was submitted to the Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6871

THE UNION CENTRAL LIFE INSURANCE COMPANY, Appellant,

versus

NANNIE MAY WILLIAMS, Appellee

Appeal from the District Court of the United States for the Northern District of Texas

(May 25, 1933)

Before Bryan, Foster and Sibley, Circuit Judges

OPINION OF THE COURT—Filed May 25th, 1933

SIBLEY, Circuit Judge:

Nannie May Williams recovered judgment against Union Central Life Insurance Company on a policy of insurance for $10,000.00 on the life of her husband, Peter Hardy Williams. The following facts appear: An annual pre-

mium of $449.10 was due each June 10th. That for 1930 was paid out of a loan or advance of $848.00 made against the policy, the insured borrowing at the same time $1,643.63 from the Company's general agents personally for which he gave them his note. Just before June 10th, 1931, the Company sent Williams a notice, which he received, stating that a premium of $449.10 would be due on that date, subject to a dividend reduction of $74.80, leaving $374.30, and that unless payment should be made the policy would be voided except as to values provided therein, but the premium would be accepted within thirty one days from its due date. The notice also stated that agents are not authorized to countersign receipts unless signed by some officer of the Company, to grant permits, make or alter contracts, waive forfeitures, or make any alterations of a renewal receipt. No other direct communication occurred between him and the Company. He did nothing about the premium or the dividend of $74.80 within the thirty one days of grace ending July 11th, 1931. The general agents sought to interest him in an arrangement by which he might surrender this and other policies which he had with the Company so as to pay the premium on and the loan against one of $15,000.00, and pay them $500.00 on their note. Of this negotiation the Company had some knowledge, for it furnished surrender forms and statements of the surrender values of the policies, but on Sept. 1st Williams definitely refused the arrangement, stating to the agents that he would sign no surrenders with any part payable to them, that it was a crooked deal and he was going to have every nickel applied toward paying these policies as far as it would carry them. This decision and statement was on Sept. 14th communicated to the Company, the agents then returning to it a check of $556.50 for dividends on the policies which the Company on Sept. 9th had sent to them to be delivered to Williams. The agents wrote that they were suing Williams on his note for $1,643.63, and garnisheeing the Company for the dividends. On Sept. 18th before garnishment was actually made the attorney for the agents got from Williams an order on the Company to pay the dividends to the agents and on Sept. 19th this order was sent to the Company, and on Sept. 28th it paid the dividends over accordingly. On Oct. 7th the Company mailed Williams a notice that on account of

failure to pay the premium due June 10th the policy, in accordance with the terms of the advance secured by the policy, became null and void and had been cancelled, and that the advance agreement was marked paid thereby. Williams received but never opened this letter. He had been ailing since spring, was kicked in the stomach and trampled upon by a bull on Aug. 16th, was thereafter afflicted with constant hiccoughs and became ill, and it is contended became mentally affected. On Sept. 17th he had all his teeth extracted, and a little later was diagnosed as having cirrhosis of the liver, and died Oct. 15th, 1931. Mrs. Williams tendered to the Company repayment of the $74.80 dividend on this policy which had been included in the payment to the agents, which tender the Company refused, and she afterwards pleaded that Williams was mentally incompetent on Sept. 18th when he signed the dividend order and that it was obtained through fraud and mistake.

The controlling assignment of error is on the court's refusal to instruct a verdict for the defendant. We have not stated the evidence relating to the making of the dividend order of Sept. 18th, nor do we pass upon its sufficiency to show insanity, fraud or mistake, because we think liability on the policy depends upon the situation on July 11th, the last day of grace for paying the premium. The transaction of Sept. 18th controls only the question whether the dividend belongs to the agents or to Williams' estate. The terms of the insurance are fixed by the policy, by the statutes under which it was made, and by the advance agreement. It is not disputed that under all of these the policy became void on the 31st day after June 10th, 1931, for nonpayment of premium unless saved by the provisions for extended insurance; that the reserve or surrender value of the policy at that date was $910.00 and the advance with interest was $898.88, the difference being insufficient to extend the insurance even to the last grace day; but that if the dividend of $74.80 be applied to purchase extended insurance or to reduce the advance against the policy the extension would reach beyond the date of death. The case therefore turns upon the disposition of the dividend. Mrs. Williams contends that it is one of the policy values which under the provisions of the statute and the policy are auto-

matically to be applied in extended insurance if no other option be exercised; or if not, that the Company should have applied it to reduce the advance against the policy, and thus increase the available reserve. The Company contends that the dividend is different from the reserve, and is governed by different policy stipulations, and that in the absence of action by Williams it could only be held for him in cash.

A dividend is in its nature clearly to be distinguished from the reserve on a policy both from the standpoint of the insurer and the insured. The reserve is usually required to be set up by law, as well as by the dictates of sound business. Very generally stated, it represents the excess charge in level premiums required to take care of the increasing risk of death as the insured grows older, and the accumulation increases with each premium paid. It is accurately computable, and is considered to inhere in and belong to the policy. Policy reserves from the standpoint of the insurer are a fixed liability required to be offset by assets in order to maintain solvency. A dividend is a profit, in its nature uncertain, which accrues when by reason of good management, good risks, or the like, the insurer's business shows results above death losses, expenses and reserves. It is a distribution from a distributable surplus. Dividends normally belong to the stockholders, which in a mutual company are the policyholders, but the insured though not a stockholder may by contract be allowed to participate. This share in profits more naturally belongs to the insured than to the beneficiary, and is a return to him of a part of his premium which the year's results have shown was not necessary to have been paid to maintain the insurance with its legal reserve. Some decisions on policy provisions less definite than those of the policy in suit have confused dividends and reserves, and have applied dividends along with the reserve to extend the insurance. Such is Atlantic Ins. Co. vs. Pharr, 59 Fed. (2d) 1024. The present policy most carefully distinguishes them and disposes separately of each, the one under the heading "Premiums and Dividends," and the other under the heading "Policy Values." Under the former heading, after dealing with premiums and grace on them, it is declared: "This policy shall participate in profits as apportioned by

the Directors * * * Dividends shall be declared annually during its continuance." Under "Dividend Options" it is provided that "Dividends may be withdrawn in cash or applied to the payment of premiums, or left to accumulate with interest at 3% * * * or applied to the purchase of paid up participating additions to the policy * * *." These options are plainly to be exercised by the insured and not by the Company. Applicable when no option is exercised is paragraph 12:

"Automatic Disposition. On payment of the premium, or on the policy anniversary if no other premium is payable, if no other option shall be elected, the dividend then due shall be applied to the purchase of paid up additions. In the event of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected, or if the policy shall lapse, the dividend then due shall be paid in cash. At the death of the insured during the continuance of the policy the pro rata part of the dividend for the current policy year shall be paid in cash."

Under the head of "Policy Values," the basis of the reserve is fixed and the surrender value for each year is set forth in a table. Options are provided to the owner of the policy to use that value in: 1. Extended participating insurance; 2. Paid up insurance; 3. Loan or advance on the security of the policy; 4. Cash on surrender. On failure to pay a premium, no option being exercised, the surrender value is to be applied automatically in extended insurance as in option 1. In that option it is additionally stated: "Accumulations of dividends at interest may be applied to increase the terms of extension." These provisions make it clear that in this contract reserve or surrender value and dividends are discriminated and separately contracted about. It will be noticed that in the options touching dividends the investment of them in extended insurance is not mentioned, though a paid-up addition to the policy is. But in the first option touching reserves it is stated that accumulations of dividends at interest may be applied to increase the term of extension. Assuming without deciding that this may cover a single dividend just declared, we think the language means that the insured may elect so to

use it, not that the Company must so apply it. The latter meaning is not expressed by the words used, and would conflict with the provision touching a recently declared dividend, that if the policy shall lapse without option exercised the dividend then due shall be paid in cash. The provisions taken together mean that when a dividend is declared the insured may elect to use it as a credit on his next premium or may buy a paid-up addition to his policy, or take it in cash, or leave it on interest subject to withdrawal at any time; and if he does neither but pays his premium otherwise, the dividend is to be laid out in a paid-up addition to the policy; but if he dies during the grace period before paying his premium and without electing any option, the dividend is to be paid in cash; or if the policy lapses for non-payment of premium the dividend is to be paid in cash, but he may direct it to be used in extended insurance. In the last stated contingency, that is lapse for non-payment of premium, which happened in this case, the surplus reserve, no option as to it having been exercised, went automatically to extended insurance, but the dividend, supposing it capable of being considered "an accumulation of dividends at interest," did not extend the extension for want of any direction by the insured thus to use it, but remained payable in cash, a fixed debt due to the insured.

We are told that these provisions ought to be construed against the Company and in favor of the insured. We do not think them so ambiguous as to require any application of that rule. The lapse happened on failure to pay a premium of $447.10. Williams was then in fair health and it was not likely he would soon die. The dividend was under the contract cash belonging to him which the Company could not lay out in extended insurance without his direction. Had it done so, and had Williams survived the extension purchased, he could have sued for his misapplied cash. It was for him to say what he would do with the dividend, whether on July 11th he preferred to buy extended insurance for a few months or to save this money for other uses. He said nothing; it remained cash due him.

It is urged that the Company ought to have applied the dividend to reduce the advance against the policy so as to increase the reserve available to buy extended insurance. The policy requires no such application. The advance agreement does not pledge the dividends nor even purport

to create a debt which might be offset against the dividend. It reads:

"In consideration of an advance of $858.00 by the Union Central Life Insurance Company, the receipt of which is hereby acknowledged, I hereby assign to and deposit with said Company as sole security for said advance and interest, its policy No. 940547 on the life of Peter H. Williams, together with the paid-up additions thereto, if any."

It is stated therein: "This advance may be paid in full or in part at any time." But there is no promise by Williams to pay it otherwise than from the policy on its forfeiture or maturity, nor any authority to the Company to apply any other credit to it. That such a contract creates no debt but is a mere anticipatory collection of the reserve due on the policy is established in Board of Assessors of Orleans Parish vs. New York Life Insurance Co., 216 U. S. 517. We do not think the Company had the duty to apply the dividend in part payment of this advance without the request of Williams to do so.

It is next said that the dividend was in fact applied to the advance by the Company because in the negotiation which went on between the agents and Williams about surrendering this and other policies and maintaining the one for $15,000.00 the Company had sent to the agents a statement of the surrender value of the policy in suit which showed the dividend, $74.80, applied as a credit and a balance of $81.00 which was due against the $15,000.00 policy charged as a debit. This statement, sent with statements of the other policies whose surrender was to free the $15,000.00 policy, was only a suggestion of what could be done, not a declaration of what had been done. It did not propose to credit the $74.80 without charging the $81.00 to the policy in suit. Whatever proposal it did make was rejected by Williams on Sept. 1st, and became of no effect.

The agents in their letter of Sept. 14th communicated to the Company that on Sept. 1st Williams, in rejecting the negotiations and refusing to pay anything to the agents, had said he wanted every nickel applied to carrying the policies. There were seven policies involved. This statement was too indefinite to serve as a direction to apply this dividend in any particular way. Moreover, it was too late for him to apply it to extend this policy for it had become

void on July 11th, and could only be reinstated on payment of the premium with interest and satisfactory medical examination, and Williams since Aug. 16 had been an ill man.

The notice of cancellation dated Oct. 7th was not one given as provided in the advance agreement in consequence of the indebtedness and advances on the policy having exceeded the loan value of the policy, all premiums being paid, in which case the insured would have thirty-one days after the notice in which to make payments before his policy would be avoided on this ground. As stated in the notice, the policy had lapsed for failure to pay a premium. The notice was unnecessary to terminate the policy for this cause, and served only to inform Williams that the Company understood that all negotiations were off and that the advance against the policy had been paid by the reserve on the policy.

It is lastly urged that the statute of Texas, Rev. Stats. of 1925, §4732, applies this dividend to extend the insurance.

"No policy of life insurance shall be issued or delivered in this State * * * unless the same shall contain provisions substantially as follows: * * * 7. A provision which in the event of default in premium payments after premiums shall have been paid for three full years shall secure to the owner of the policy a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy *and on any dividend additions thereto* * * *"

The contention is that "dividend additions" means dividends, and that the reserve plus dividends is required to be laid out in extended insurance. This interpretation overlooks the word "on." The net value is to equal the reserve on the policy and on any dividend additions thereto. Two reserves are thus spoken of, one on the original policy and the other on additions to the policy theretofore purchased by dividends. The last words of sub-paragraph 6 just preceding are: "No provision herein shall compel any company to loan on any policy an amount greater than 97½% of the face value thereof, including net dividend additions thereto." Here the words would be nonsense if construed to mean dividends, and so they would be in several other places where they occur in this same statute. The uncontradicted testimony in this case is that in the insurance

world dividend additions are paid-up insurance in addition to the face of the policy and purchased with dividends. In this sense they are the equivalent of the expression "paid up additions" occurring several times in the policy before us in connection with dividends. We think this is the meaning intended by the Texas Legislature. The use of the word dividends in place of dividend additions in paraphrasing another part of this statute in First Texas State Insurance Co. vs. Smalley, 111 Texas 68, was not a construction in this respect of the statute, for no such question was before the court, but was apparently inadvertent. Similar words in a different setting were given the meaning contended for by appellee in a New York Statute in United States Life Ins. Co. vs. Spinks, 126 Ky. 405, but what we think is their proper meaning in the Texas statute was later given them by the same court in a contract, Mutual Life Ins. Co. vs. O'Brien, —Ky.—, 116 S. W. 750, and in the statute of Kentucky in Jefferson vs. New York Life Ins. Co., 151 Ky. 609, 152 S. W. 780.

Under the evidence discussed, the policy sued on was not of force after July 11, 1931, and the Company only owed the declared dividend in respect thereof.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

No. 6871

THE UNION CENTRAL LIFE INSURANCE COMPANY

versus

NANNIE MAY WILLIAMS

JUDGMENT

Extract from the Minutes of May 25th, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, re-

versed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Nannie May Williams, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 6871

THE UNION CENTRAL LIFE INSURANCE CO., Appellant,

vs.

NANNIE MAY WILLIAMS, Appellee

MOTION AND ORDER STAYING MANDATE—Filed June 14, 1933

To the Honorable Circuit Court of Appeals:

Now comes Nannie May Williams, appellee in the above styled and numbered cause, and files this—her motion—that the mandate in said cause be stayed upon the following grounds:

On May 25, 1933, this Honorable Court rendered its decision herein, reversing the judgment of the lower court and remanding the cause for further proceedings not inconsistent with the opinion. No petition for rehearing has been or will be filed.

Appellee desires and expects to make application to the Supreme Court of the United States for a writ of certiorari, to remove the case thereto and review the decision of this court; that the time for filing said application for petition for certiorari in the Supreme Court will be not later than August 25, 1933; that the District Court for the San Angelo division of the Northern District of Texas will not convene before the third Monday in October, 1933; that the mandate herein, unless stayed by order of this court, will issue, as a matter of course, at any time after the 14th day of June, 1933, which will make unnecessary delay and complications in applying for a writ of certiorari to the Supreme Court.

Wherefore this appellee prays the court that an order be entered staying the issuance and sending down to the District Court of the mandate of this court in said cause until appellee's application for a writ of certiorari to the Supreme Court has been acted upon by said Court.

(Signed) Chas. Gibbs, McGown & McGown, Anderson, Orr & McCord, H. O. Williams, Attorneys for Appellee, Nannie May Williams.

STATE OF TEXAS,
County of Tom Green:

H. O. Williams, one of the attorneys for appellee, Nannie May Williams, being duly sworn upon his oath, deposes and says: that he has read the foregoing motion and that the statements of fact therein are true to the best of his knowledge and belief.

(Signed) H. O. Williams.

Subscribed and sworn to before me by H. O. Williams this 12th day of June, A. D. 1933.
(Signed) Lynnette Miers, Notary Public, Tom Green County, Texas. (Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 6871

THE UNION CENTRAL LIFE INSURANCE COMPANY, Appellant,

versus

NANNIE MAY WILLIAMS, Appellee

On consideration of the application of the Appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court

the certificate of the clerk of the Supreme Court that the certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 14th day of June, 1933.

(Signed) Rufus E. Foster, United States Circuit Judge.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 221 to 236 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 6871, wherein The Union Central Life Insurance Company is appellant, and Nannie May Williams is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 220 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 14th day of June, A. D. 1933.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 208

NANNIE MAY WILLIAMS, PETITIONER AND APPELLANT BELOW,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and Associate Justices of the United States:

I.

Summary Statement of the Matter Involved.

This is an action at law upon a policy of life insurance brought in the State District Court of Irion County, Texas, by petitioner, Nannie May Williams, as plaintiff, against The Union Central Life Insurance

Company, respondent herein, as defendant, plaintiff being a resident and citizen of the State of Texas and defendant being a citizen of the State of Ohio, duly incorporated under the laws of said State with its home office at Cincinnati.

Petition and bond for removal to the Federal court were filed by defendant and the cause removed to the United States District Court, San Angelo Division, for the Northern District of Texas. A jury trial was had at the October, 1932, term of said United States District Court and, conformably to the verdict of the jury, judgment was on October 20, 1932, rendered in favor of plaintiff in the sum of $11,512.75 with interest thereon at the rate of 6 per cent per annum from date thereof, and costs. After its motion for new trial had been overruled, defendant respondent herein, duly perfected an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, which court reversed the judgment of the District Court and remanded the cause for further proceedings not inconsistent with the opinion.

Petitioner is the widow of Peter Hardy Williams, to whom the respondent on July 26, 1927, issued its policy of life insurance #940457 in the face amount of $10,000.00. Petitioner was designated as the beneficiary in said policy. The said P. H. (Peter Hardy) Williams died in San Angelo, Texas, on October 15, 1931.

Said policy was what is known as a participating policy, that is, participating annually in dividends. An annual premium of $449.10 was payable on June 10th

of each year. All premiums for the first four policy years were duly paid. The annual dividends throughout those years were applied in part payment of, or in reduction of, the annual premium. For the policy year ending June 10, 1931, there was declared by the respondent a dividend on said policy of $74.80. A short time prior to June 10, 1931, defendant sent to the said insured, and there was received by him, the following communication:

"The Union Central Life Insurance Company.

Home Office: Cincinnati, Ohio.

"You are hereby notified that a premium as described below will become due and be payable subject to the conditions of this notice.

Premium and Dividend Statement.	Amt. of Premium.	Policy No.	How Payable.	Date Due.	Month.
Amount of Premium ...	$449.10	$449.10	940,457	A	10th June
Dividend Reduction ..	74.80	Peter H. Williams, Central Hotel,			
Amount Due ..	$374.30	San Angelo, Tex.			

"Please make payment before that date to The Union Central Life Ins. Co., 1127-28 Athletic Club Bldg., Dallas, Tex.

"Checks and Money orders should be made payable to The Union Central Life Insurance Company.

"Return this notice and receipt will be sent you.

"Unless said premium shall be paid to the Company, or a duly appointed Agent or person authorized to collect the same on or before the day it falls due, your policy and all payments

thereon will become forfeited and void except as to values provided for therein.

"To conform with the laws of certain States the above notice is given, but a cash payment of the premium without interest will be accepted at any time within thirty-one days from its due date.

"Agents are not authorized to countersign receipts, unless signed by some officer of the Company, to grant permits, make or alter contracts, waive forfeiture, or make any alterations of a renewal receipt.

"If the address on the face of this notice is not correct please indicate by writing 'Over' on the face thereof, and give the correct address in the space below.

W. HOWARD COX,
Secretary.

"No. ——, Street ——, Town ——.
"County ——, State ——."

The policy provided for a grace of 31 days within which to pay the annual premium and respondent did not pay, or offer to pay, said dividend in cash at the expiration of said days of grace, nor at any time thereabouts. Insured was unable to and did not pay the balance of the annual premium. At the end of the days of grace, that is, on July 11, 1931, there was an indebtedness against the policy aggregating, principal and interest, $898.88, same being evidenced by a policy loan note dated June 10, 1930 (Tr. pp. 91-93). The policy is set forth in the transcript on pages 83 to 90, inclusive. The material provisions thereof are as follows:

"(P. 2.) "Premiums and Dividends.

"8. Payment of Premiums.—All premiums shall be payable in advance, either at the Home Office, or to an authorized agent of the Company on delivery of a receipt signed by the President or Secretary and countersigned by such agent.

"Failure to pay any of the first two years' premiums, or installment thereof, shall avoid and nullify this contract.

"After two full years' premiums have been paid, on failure to pay any subsequent premium, this policy shall lapse and its value, if any, shall be applied as set forth in article sixteen.

"The note of the insured or the beneficiary, or their assigns, shall be accepted in payment of the second or subsequent year's premium, or part thereof, if the surrender value of the policy shall equal or exceed such note and any other indebtedness on the policy. Any note accepted in payment of a premium shall be a first lien on the policy and a set-off in the calculation of policy values.

"9. Grace.—A grace of thirty-one days shall be granted for the payment of any premium after the first. In event of the death of the insured during the days of grace the insurance shall be deemed to be in force, and any unpaid premium for the current policy year shall be deducted from the sum payable.

"10. Dividends.—This policy shall participate in profits, as apportioned by the directors. Beginning at the end of the first policy year, provided the second year's premium is paid, dividends shall be declared annually during its continuance.

"11. Dividend Options.—Dividends may be withdrawn in cash; or applied to the payment of premiums; or left to accumulate with interest at three per cent, increased from surplus interest earnings as apportioned by the Directors, until the maturity of the policy, subject to withdrawal at any time; or applied to the purchase of paid-up participating additions to the policy, convertible into cash at any time for the amount of the original dividends or the reserve of the additions, if larger, but payment may be deferred by the Company ninety days from the date of application therefor.

"12. Automatic Disposition.—On payment of the premium, or on the policy anniversary if no further premium is payable, if no other option has been elected, the dividend then due shall be applied to the purchase of paid-up additions. In the event of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected, or if the policy shall lapse, the dividend then due shall be paid in cash. At the death of the insured during the continuance of the policy, the pro rata part of the dividend for the current policy year shall be paid in cash.

"13. Policy May Be Paid-up.—At the fifth or any subsequent anniversary this policy will be indorsed fully paid-up on payment, by dividend credits or otherwise, of the difference between the reserve of this policy and the corresponding net single premium at the attained age.

"Policy Values."

"14. Reserve Basis.—The reserve of this policy is computed on the American Experience Table of Mortality with interest 3½%.

"15. Surrender Value.—After two full years' premiums have been paid, the surrender value for each thousand dollars of insurance is equal to the reserve at the end of the policy year, omitting cents, except that in the second, third and fourth policy years, it is equal to the reserve at the end of the policy year, taken to the nearest dollar, less surrender charges of $21, $13 and $6 respectively.

"16. Policy Values.—The surrender value may be used at the option of the owner of the policy in any one of the following ways, all of equal value, as set forth in the following tables, provided there be no indebtedness or advances on the policy. If, on failure to pay a premium, no option is exercised, such value shall be applied as provided in Option 1.

"17. Option 1. Extended Insurance.—Applied to the extension of this policy as participating term insurance from the date to which premiums have been paid, without any further payment (Table 1.) The value of any paid-up additions will be used to increase the term of extension. Accumulations of dividends at interest may be applied to increase the term of extension. Dividends on extended insurance shall be paid in cash and only for completed policy years.

"18. Option 2. Paid-up Insurance.—Applied to the purchase of paid-up participating insurance, on written request and the surrender of the policy before the expiration of the days of grace. (Table 2.) Any paid-up additions will be added to the amount of the paid-up insurance. Accumulations of dividends at interest may be applied to purchase additional paid-up insurance provided the total amount of paid-up insur-

ance shall not exceed the face amount of the policy. Dividends on paid-up insurance shall be paid in cash.

"19. Option 3. Loan.—Borrowed or taken in advance in whole or in part on the sole security of the policy, on assignment thereof, less the unpaid balance of the current year's premium and any indebtedness and previous advance on this policy, at six per cent interest payable annually on the anniversary of the policy, interest to be discounted and paid in advance (Table 3).

"Failure to repay any such advance or to pay interest shall avoid this policy whenever but not until the total indebtedness and advances hereon with interest shall equal or exceed the then loan value and not until one month after notice shall have been mailed by the Company to the last known address of the insured, and of the assignee, if any.

"The loan value will be increased by the value of any paid-up additions.

"The loan value, less interest to next anniversary, is available at any time during the policy year if premiums have been paid to the end of the year.

"Consummation of loans other than to pay premiums on policies in this Company may be deferred by the Company ninety days from the date of application therefor.

"20. Option 4. Cash.—Collected in cash on written surrender of the policy before the expiration of the days of grace (Table 4). The cash value will be increased by the value of any paid-up additions. Payment may be deferred by the Company ninety days from the date of application therefor.

"21. Credit for Fractional Premiums.—If default shall occur at any time other than the end of the policy year the values for the preceding policy year shall be proportionately increased for the portion of the policy year for which premiums have been paid.

"22. Deduction of Indebtedness.—If there be any indebtedness or advances on this policy, the cash value shall be reduced thereby; the paid-up value shall be reduced proportionately; and the extended insurance shall be for the face value of the policy less the indebtedness and advances and for such term as said reduced cash value will provide.

"23. Tables of Values.—The values in these tables are on the basis of $1,000 of insurance, assuming all premiums to have been paid when due. If this policy is for insurance of more or less than $1,000, the paid-up insurance, loan and cash values are increased or reduced proportionately. The term of extended insurance does not vary with the amount of insurance. The surrender charge has been deducted. Values for the years not stated will be furnished on application.

Age 51. Ordinary Life.

End of year.	1. Extended ins.	2. Paid Up insurance for each $1,000 of the sum insured.	3. Loan or 4. cash.	End of year.
2	1 year, 250 days	$49	$27	2
3	3 years, 165 "	107	59	3
4	4 years, 330 "	160	91	4
5	6 years, 25 "	210	121	5"

The policy was applied for and delivered in the State of Texas.

As set forth under Section 23 in the policy, the tabular surrender value at the end of the fourth policy year was $910.00, exceeding the indebtedness against the policy by the sum of $11.12.

The whole controversy revolves around two principal questions:

(1) The applicability and the application of the 1931 dividend for insurance benefits.

(2) The transaction on September 18, 1931, between the insured and the attorney representing Lee & Lee, general agents of the company, in which transaction insured signed a dividend order in favor of said Lee & Lee covering the dividend on this policy and several others, and in which transaction insured executed a note in the amount of $914.77 payable to the order of The Union Central Life Insurance Company.

With reference to this phase of the case, petitioner pleaded mental incompetency of the insured, mistake and fraud.

The Circuit Court of Appeals held that, as a matter of law, the policy sued on was not of force after July 11, 1931, and as this ruling disposes of the whole case, did not pass upon respondent's assignments challenging the sufficiency of the evidence to show insanity, fraud or mistake relative to said transaction of September 18, 1931.

Under date of July 15, 1931, the actuarial department in the home office of respondent made out a statement relating to the policy in suit and mailed same to Lee & Lee, General Agents, at Dallas, Texas. Said statement is headed as follows:

The Union Central Life Insurance Company.

Surrender Value of Policy No. 940,457 on the Life of Peter H. Williams."

It contains the following tabulations relating to the surrender value:

"Cash Value of Policy as of 6-10-31	$910.00	
Cash Value of Dividend due 6-10-31, less discount	74.80	
Total		$984.80
Deductions; Policy loan	$848.00	
Loan Interest 6-10-30 to 6-10-31	50.88	
No. 989,358 Balance on Loan	81.10	
Total Deductions		979.98
Net Cash Surrender Value available to 7-10-31		$4.82"

(Tr. pp. 175-176-177-178.)

The deduction labelled "No. 989,358 balance on loan" was without any warrant or authority whatsoever. The general agents of the company, Lee & Lee, had suggested a plan for the payment of the full annual premium on policy No. 989,358 ($15,000.00 policy) by use of a part of the dividends, thereby distributing the loan on said policy No. 939,358 in the form of charges against or deductions from the reserve of five other policies, including the one involved herein. By this plan, they hoped to obtain something like $500.00

as a payment on a note owing to them by the insured. The insured never did agree to any such arrangement. On the contrary, he unequivocally repudiated same, and the company had no authority whatsoever to make any such deduction against the reserve or the surrender value of the policy in suit.

In response to a letter written by petitioner's attorney to the home office requesting forms for proof of death, respondent advised that the policy in suit "lapsed without value for failure to pay premium due 6-10-31. At the time of lapse the outstanding indebtedness, by way of policy advance and interest, exhausted all equity" (Tr. p. 100).

Under date of October 7, 1931, the home office of respondent mailed notice of cancellation, which was sent to the farm of the insured. He was ill in San Angelo, however, and never saw said notice. Said notice appears in the transcript, page 165.

As the Circuit Court of Appeals did not pass upon respondent's assignments of error relating to the second phase of the case, that is, the transaction of September 18, 1931, we have given hereinabove only a summary as to the first phase; that is, as to whether there was insurance in force on September 18, 1931.

On page 131 of the transcript of the record appears the following stipulation entered into in open court:

> "It was agreed that $74.80 is sufficient in amount, if applied in reduction of the indebtedness against the policy, or if applied to the purchase of extended insurance, to purchase extended insurance for a period beyond the date of the death of P. H. Williams; that the sur-

render value of the policy, if increased by $74.80 at the time of its lapse, becomes sufficient in amount to purchase extended insurance for a period expiring after the date of the death of P. H. Williams; the amount of such extended insurance being the amount of the policy less the indebtedness, including in the deduction, in addition to principal, interest thereon for one year, up to June 10, 1931. By this stipulation, it is not intended that the plaintiff admits that the 1931 dividend of $74.80 was not applied in reduction of the indebtedness against the policy or to the purchase of extended insurance or to increase the cash value of the policy, nor is it intended that the defendant admits that the dividend was applied in any of the ways mentioned."

"The following is copied from the testimony of Arthur J. Koeppe, defendant's assistant actuary (Tr. pp. 171-172):

" 'Q. Then it is true, isn't it, that the amount of the 1931 dividend of the policy involved in this lawsuit, if added to the policy reserve or included in the policy value, would have augmented the policy value so that the difference between the augmented policy value and the indebtedness at the date of default was enough to provide for extended insurance until after October 15, 1931?

" 'A. Yes, sir.

" 'Q. And it is true that the same result follows by subtracting the amount of the dividend from the indebtedness?

" 'A. Yes, sir. It would carry the extended insurance beyond October 15, 1931—quite a few months beyond'."

It is undisputed that if the 1931 dividend was a part of or was made a part of the "surrender value or cash value" referred to in Articles 16, 17 and 22 of the policy, then extended insurance for a period beyond the death of insured resulted.

The policy was in the possession of the home office of respondent from June, 1930, to the date of the trial of this cause, being so held by it under the policy loan agreement or policy advance agreement executed in June, 1930. The judgment sought to be reviewed was rendered May 25, 1931.

II.

Reasons Relied on for the Allowance of the Writ.

(1) The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Atlantic Life Insurance Company* v. *Pharr,* 59 Fed. (2d) 1024. (Certiorari denied October 17, 1932. 77 L. Ed. — Adv.)

(2) The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Harvey* v. *Union Central Life Insurance Co.,* 45 Fed. (2d) 78. (Certiorari denied, 51 Sup. Ct. 353); the decisions being substantially on the same matter and the conflict being real and substantial, as disclosed by the respective opinions.

(3) The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit

Court of Appeals for the Eighth Circuit in the case of *Great Southern Life Insurance Company* v. *Jones*, 35 Fed. (2d) 122; the decisions being substantially on the same matter and the conflict being real and substantial, as disclosed by the respective opinions.

(4) In this case the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions in this: That the Circuit Court of Appeals has held that the phrase "dividend additions" or "reserve on dividend additions" as used in Art. 4732 R. C. S. of Texas 1925, does not include a declared dividend to the credit of the policy holder; such construction being contrary to the interpretation of said statute by the Court of Civil Appeals of Texas for the Seventh Supreme Judicial District in the case of *Occidental Life Insurance Company* v. *Jamora*, 44 S. W. (2d) 808, and contrary to the view of the Supreme Court of the State of Texas in the case of *First Texas State Insurance Company* v. *Smalley*, 111 Texas, 68; 228 S. W. 55.

(5) The holding of the Circuit Court of Appeals in this case that a policy loan or policy advance agreement, such as is involved herein, creates no debt but is a mere anticipatory collection of the reserve on the policy, is probably in conflict with the applicable local decisions; such applicable local decisions being:

Occidental Life Ins. Co. v. *Jamora*, 44 S. W. (2d) 808;

Amicable Life Ins. Co. v. *White*, 38 S. W. (2d) 860.

(6) In holding that under the facts in this case the 1931 dividend did not become a part of the surrender value operating to provide for extended insurance, the Circuit Court of Appeals has decided an important question of general law and such holding is in conflict with the weight of authority.

(7) In holding that the policy involved herein became void on July 11, 1931, the Circuit Court of Appeals decided an important question of general law in a way probably untenable, and such holding is in conflict with the weight of authority.

(8) In this case the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervision in this: That the Circuit Court of Appeals held that the statement dated July 15, 1931, made out in the home office by the actuarial department of respondent—which statement showed that the 1931 dividend had been calculated as a part of and had been included in the surrender value—"was only a suggestion of what could be done, not a declaration of what had been done;" and such holding is in the face of and contrary to the uncontradicted evidence and is contrary to and in the face of the recitals in said instrument, and is based merely upon surmise; said error being inadvertent.

The testimony of the actuary, Mr. Koeppe, in charge of the department of The Union Central Life Insurance Company directing the disposition of dividends, insofar as said testimony relates to said instrument, appears on pages 173, 174 and 175 of the transcript and

said instrument appears on pages 175 to 178, inclusive, of the transcript.

Wherefore your petitioner prays that a writ of certiorari issue under the order of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify to and send to this Court a full and complete transcript of the record had in the case numbered and entitled on its docket "No. 6871, *The Union Central Life Insurance Company, Appellant* v. *Nannie May Williams, Appellee*," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States and that the judgment herein of said Circuit Court of Appeals be reversed by the court, and for such further relief as to this Court may seem proper.

Dated this 24th day of June, A. D. 1933.

Nannie May Williams,
By Charles O. Harris,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1933.

No. 208

NANNIE MAY WILLIAMS, PETITIONER AND APPELLANT BELOW,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY, RESPONDENT AND APPELLEE BELOW.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals (Tr. p. 221) (not reported) is dated May 25, 1933.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is May 25, 1933 (Tr. p. 229).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 347, Title 28 (U. S. C. A.), United States Code; Section 240 of

Judicial Code as amended February 13, 1925; 43 Statutes 938.

III.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 1-14), which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court on the theory that the 1931 dividend was not a part of the surrender value operating to provide for extended insurance.

2. The Circuit Court of Appeals erred in holding that the actuarial statement under date of July 15, 1931—which included the 1931 dividend in the surrender value—was "only a suggestion of what could be done, not a declaration of what had been done."

3. The Circuit Court of Appeals erred in reversing the judgment of the trial court on the theory that the insured did not elect to have the 1931 dividend used to provide for extended insurance.

4. The Circuit Court of Appeals erred in holding that the direction given by insured about the first of September, 1931, that he wanted every nickel applied "towards paying these policies as far as it would carry them," was too indefinite to serve as a direc-

tion to apply the 1931 dividend for the purpose of providing for extended insurance; and that it was then too late for him to have said dividends so applied.

5. The Circuit Court of Appeals erred in holding that Section 7 of Article 4732, Revised Civil Statutes of Texas (1925) does not require a declared dividend to be included in the non-forfeitable value of a policy of life insurance delivered in the State of Texas; and in so construing said statute as to exclude from the policy value the 1931 dividend involved in this case.

6. The Circuit Court of Appeals erred in reversing the judgment of the trial court on the theory that the policy sued on was not of force after July 11, 1931.

7. The Circuit Court of Appeals erred in holding that the notice of cancellation, dated and mailed October 7, 1931, was not such a notice as brought into operation the provisions of the policy stipulating that the insurance should continue in force for thirty-one days from the date of mailing of such notice.

V.

ARGUMENT.

Point A.

The 1931 dividend was a part of the policy value or surrender value operating to provide for extended insurance.

1. The dividend is a part of such value under the provisions of the policy. The third paragraph of Article 8 is as follows:

> "After two full years' premiums have been paid, on failure to pay any subsequent premium this policy shall lapse and its value, if any, shall be applied as set forth in Article 16."

This is a declaration that *all* of the value the policy has shall be so applied.

The following sentence is found in Article 12 under the heading, "Automatic Disposition":

> "'In the event of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected, or if the policy shall lapse, the dividend then due shall be paid in cash."

It is submitted that the provision contained in the above quotation from Article 12 conflicts with the provision contained in the above quotation from Article 8. This conflict can be eliminated by restricting the application of the provision contained in Article 12 to a lapse occurring before the payment of two full years' premium; otherwise, an ambiguity arises and an uncertainty exists which, under a rule of construction universally recognized, calls for an interpretation of the policy most favorable to the insured.

The Circuit Court of Appeals for the Sixth Circuit applied this rule in a somewhat similar situation and to a policy containing substantially similar provisions, in the case of *Atlantic Life Insurance Company* v. *Pharr*, 59 Fed. (2d) 1024. In that case the insured had borrowed, or had been advanced, the full loan or tabular surrender value. An annual premium was due June 16, 1927. No payment of same was made. Some

time prior to the said date of June 16, 1927, the company had sent the insured premium notice as follows:

> "Surplus earnings of $115.20 under the above numbered policy will be due upon payment of the 1927 premium. The surplus earnings may be applied as follows:
>
> "1st. Drawn in cash; or
>
> "2nd. *Applied to the payment of premium;* or,
>
> "3rd. Applied to the purchase of $240.00 fully paid up insurance payable at maturity, in addition to the face of the policy; or,
>
> "4th. Left with the Company to accumulate to your credit."

The insured died October 12, 1927. The controlling question in the case was whether extended insurance was in force at the time of his death. The policy contained an automatic non-forfeiture provision as follows:

> "*Automatic Non-forfeiture Provision.*—Upon the non-payment of any premium after the second, without action on the part of the insured, the Company will advance such premium, also subsequent unpaid premiums, with interest at 6 per cent per annum due annually in advance, as a premium loan secured by this Contract, so long as such loan together with all other indebtedness and with interest at 6 per cent per annum due annually in advance does not exceed the Cash Value of this contract, plus any dividends on deposit, or the Cash Value of any additional paid-up insurance, at the end of the period

> to which any such premium or interest applies. * * *
>
> "If the available Cash Value be insufficient to pay an annual premium and interest as above stated, the Company will continue the Contract as Extended Term Insurance for such time as the balance of value will permit."

The court said in part as follows (page 1026):

> "Obviously, by the provisions of the policy and by the terms of the premium notice, the dividend allotted to this policy was subject to be applied by the insured to the payment of the premium. Quite as clearly, also, the amount of the dividend was insufficient to pay the whole of an annual premium. Either upon the ground that the policy should be construed as entitling the insured to the dividend 'at the time fixed for payment of the premium', or on the ground that the 'cash value' referred to in the automatic non-forfeiture provision must be deemed to include any dividend already allotted to the contract, or upon both grounds, we are of the opinion that this dividend represented funds in the hands of the company which the insured was entitled to have applied toward the payment of premiums, and which, if retained by the company, must be applied to the purchase of extended term insurance, inasmuch as such funds were insufficient to pay the entire annual premium."

In the case of *Harvey* v. *The Union Central Life Insurance Company*, 45 F. (2d) 78, the Circuit Court of Appeals for the Fourth Circuit had under consideration a policy issued by this defendant, which policy

contained the following provisions relating to dividends:

Article 10 of the policy provides as follows:

> "Dividends.—This policy shall participate in profits, as apportioned by the Directors. Beginning at the end of the first policy year, provided the second year's premium is paid, dividends shall be declared annually during its continuance."

Article 11 provides as follows:

> "Disposition of Dividends.—Dividends may be withdrawn in cash; or applied to the purchase of paid-up participating additions to the policy; or left to accumulate with interest at three per cent, increased from surplus interest earnings as apportioned by the Directors, until the maturity of the policy, subject to withdrawal at any anniversary thereof.
>
> "If the owner of this policy shall not exercise any other option the dividend shall be applied, on the expiry of the days of grace, to the purchase of paid-up additions, except that if the policy shall lapse the dividend shall be paid in cash.
>
> "Paid-up additions are convertible into cash at any time at the request of the insured for amounts not less than the original dividends."

In the Harvey case the insurance company urged the same construction of the policy there involved that it now urges with respect to the policy involved in this case (that is, with regard to the disposition of dividends). The decision in the Harvey case was by a

divided court. The following quotation is taken from the majority opinion:

> "From year to year the loan value of the policy had been increased by the building up of the policy reserve, and since the policy expressly stipulated that the dividend was payable at the end of the policy year, that is to say, November 7, this amount was available as part of the loan value of the policy. A significant fact is that the dividend in question was retained by the company for months without any offer to pay it in cash either before or after the expiration of the days of grace. Article 16 of the policy provides that in case of a loan or advances, failure to pay interest shall not avoid the policy until the total indebtedness and advances shall equal or exceed the loan value at the time of such failure. Whether we take the view that the dividend in question was used to increase the reserve of the policy or applied to extended term insurance, the result will be the same. It should be borne in mind also that at the time this dividend accrued the company held two policy lien notes, and even if the dividend should have been paid in cash, it was a creditor in possession with the right to apply the money to the reduction of the loan, and that it was its general duty to use whatever legal means were in reach to keep the policy alive. Certainly we think that the facts shown by the testimony are sufficient to require a submission of this question to the jury, even if we should hold that the dividend was payable in cash."

Respondent submits that the decision of the Circuit Court of Appeals in this case is in conflict with the de-

cision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Atlantic Life Insurance Company* v. *Pharr, supra,* and is also in conflict with the majority opinion in the case of *Harvey* v. *The Union Central Life Insurance Company, supra.*

2. The 1931 dividend and premium notice operated to make the 1931 dividend a part of the policy value or surrender value. Said notice is copied in full in the foregoing petition at page 3 and appears on pages 100 and 101 of the transcript. Signed by W. Howard Cox, Secretary, it stated in substance that the amount of the premium was $449.10. That the dividend reduction was $74.80. The difference between these two amounts, $374.30, was designated as the amount due. On the reverse side appears the following clause:

> "Unless said premium shall be paid to the Company, or a duly appointed Agent or person authorized to collect the same on or before the day it falls due, your policy and all payments thereon will become forfeited and void except as to values provided for therein."

Said notice was mailed to the insured a short time, something like fifteen days, prior to June 10, 1931. He received same prior to June 10, 1931. He made no claim or demand that the dividend be paid him in cash. The home office did not further communicate with him nor he with the home office. No offer was made to pay him the dividend in cash.

What is the meaning of the phrase, "the policy and all payments thereon will become forfeited and void except as to values provided for therein"? Is not its

meaning the same as if it had been written: "Your policy and all payments thereon will not become forfeited and void as to values provided for therein"?

Now in said clause, "the policy" and "all payments thereon" are treated as integral, just as though in lieu of the phrase, "your policy and all payments thereon", had been written the phrase "your policy, including all payments thereon". In other words, the sender of said notice was not dealing with two subject matters: Insurance, and cash on hand separate from insurance, but was dealing solely with *insurance,* and by the term "values" as used in that clause, is clearly meant *insurance* values.

The defendant introduced in evidence the dividend notices for the years 1928 and 1929. They are identical in all material respects with the 1931 dividend notice except in two particulars, as follows:

First. They contain a clause not found in the 1931 notice, said clause being:

> "If the dividend is not to be used in reduction of premium due in accordance with above statement, send settlement covering premium due and *instruct* whether dividend is to *purchase additional insurance* or remain at interest." (Italics ours.)

Second. The "unless" clause in said 1928-1929 dividend notices reads as follows:

> "Unless said premium shall be paid to the company or to a duly appointed agent or person authorized to collect same on or before the day it falls due, your policy and all payments thereon

will become forfeited and void (except as to the right to a surrender value or paid-up policy)."

Said 1928-1929 dividend notices appear on pages 165-166-167-168 of the transcript.

Defendant did not introduce in evidence the 1930 dividend notice. Thus, it appears that at some time between the year 1929 and June, 1931, defendant in some manner learned that the insured wanted all dividends applied to the purchase of insurance. This conclusion is based upon a comparison of the 1931 dividend notice with the dividend notices for the years 1928 and 1929.

Now in the 1931 dividend notice did not the insurer say, in effect, to the insured: "Your 1931 dividend is being applied by us; said dividend goes into our pocket. In lieu of the same in cash, you are entitled to insurance or insurance benefits. We will make settlement with you for said 1931 dividend in terms of insurance"?

Under the provisions of said notice, did not the 1931 dividend become "a payment on" the policy? The company said to the insured: "If you do not pay the balance of the annual premium—the 'amount due'—within the thirty-one days of grace, and thereby make default in the payment of the total annual premium, nevertheless the said sum of $74.80 remains ours. You will have no right to take in cash the 1931 dividend, but in lieu thereof you will have insurance values or benefits as provided for in the policy".

Bearing in mind the situation of the parties, the disposition made of dividends for all prior years, the knowledge of the company that the insured wanted the

1931 dividend applied for insurance benefits, the fact that the company did not pay nor offer to pay said dividend in cash, we respectfully submit that the said 1931 dividend notice, interpreted in the light of all these circumstances, operated as an application of said dividend to insurance benefits and made same a part of the policy value, and under the stipulation of the parties herein, said policy was in force as extended insurance at the date of the death of insured.

3. The actuarial statement of July 15, 1931, shows that respondent, in fact, made the 1931 dividend, and applied same as, a part of the surrender value. Said instrument appears in the transcript on pages 175-178, inclusive, as follows:

"The Union Central Life Insurance Company.

Surrender Value of Policy No. 940,457 *on the Life of Peter H. Williams.*

Cash Value of Policy as of 6-10-31	$910.00
Cash Value of Reversionary Additions ($—)	
Cash Value of Dividend Deposit including interest	
Cash Value of Dividend due 6-10-31 less discount	74.80
Total	$984.80
Deductions:	
Policy Loan	$848.00
Loan Interest, 6-10-30 to 6-10-31	50.88

Premium Note Due
Prem. Note Interest to
No. 989358 balance on loan -81.10
Total Deductions 979.98

Net Cash Surrender Value Available to 7 10 31 $4.82

Premiums Paid to 6-10 31.
Policy in force 4 years.
Insured born 12 10 75.
Maximum Loan Values (pledging Reversionary Additions, if any) on $.
Premium due $.
Deductions: Less Dividends $ and Discount $.
Indebtedness (if any) as shown above $—.
Interest (discount) on new loan to — $—.
Balance in cash due on — $—.
Paid-up value (gross) on — $—. Paid-up value (net) on — $, will sustain indebtedness of $, cancelling indebtedness of $—.
Enclosures: 3-A.
Signatures: Insured as Peter H. Williams.
Return renewal to auditor.
Please explain carefully the voucher instructions to the payee.
Remarks: It is assumed the Agent will use every effort to prevent surrender, suggesting, if necessary, the loan and paid-up alternatives.
Cash value of additions or dividend deposit is payable without voucher if no item to be deducted.
Loan may be paid off by partial payments.
Dividend Deposit cannot increase loan value.
To agency of Lee & Lee.
Dated 7-15-31.

S. T. Brading, Manager, Surrender Division.
(P. 2) The Union Central Life Insurance Company.

Cash Surrender Voucher.

The Union Central Life Insurance Company is hereby requested and authorized to make payment as follows in full satisfaction of all claims under the said policy, and the said policy is hereby surrendered to the said Insurance Company for cancellation and discharge.

Surrender value of policy No. 940457 on the life of Peter H. Williams.

Cash Value of Policy as of 6 10 31		$910.00
Cash Value of Reversionary Additions ($)		
Cash Value of Dividend Deposit including interest		
Cash Value of Dividend due 6 10 31 less discount		74.80
Total		$984.80
Deductions:		
Policy Loan	$848.00	
Loan Interest, 6-10-30 to 6-10 31	50.88	
Premium Note due		
Premium note interest to ——		
No. 989358 balance on loan	81.80	
Total Deductions		979.98
Net Cash Surrender Value Available to 7-10-31		$4.82

Caution.

Payment of the said net cash surrender value above indicated is to be made to the said insured unless otherwise instructed in writing below on the line marked *.

*Name (of payee other than insured):
, $
Address:
Name (of Payee other than insured):
, $
Address:

For the purpose of obtaining the cash value, each of us declares that he or she has made no assignment of said policy, and that no petition that he or she be adjudged a bankrupt has ever been filed by or against him or her.

Dated at this day of , 19 .

, [SEAL.]
Insured.
, [SEAL.]
Beneficiary.
, [SEAL.]
Assignee."

,
Witness.
,
Witness.
,
Witness."

It will be noted that in the tabulated statements appearing in the foregoing instrument appears under the head "Deductions", a third deduction of $81.10,

By

labeled: "No. 989358 balance on loan." No. 989358 was a $15,000 policy held by the insured. He never did agree to any deduction from the reserve or surrender value of the policy in suit to pay or discharge any part of the loan on said policy #989358. There was no authority whatsoever for said deduction of $81.10. Let us see how said tabulated statement looks with said unauthorized third deduction deleted:

"The Union Central Life Insurance Company.

Surrender Value of Policy No. 940,457 on the Life of Peter H. Williams.

Cash Value of Policy as of 6 10 31		$910.00
Cash Value of Reversionary Additions		
Cash Value of Dividend Deposit including interest		
Cash Value of Dividend due 6 10 31 less discount		74.80
Total		984.80
Deductions:		
Policy Loan	$848.00	
Loan Interest 6-10-30 to 6 10 31	50.88	
Premium Note Due		
Prem. Note Interest to		
Total Deductions		$898.88
Net Cash Surrender Value available to 7-10-31		$85.92"

The said net cash surrender value of $85.92 available to July 10, 1931, was, under the stipulation of the

parties and the testimony of respondent's actuary, copied in the foregoing petition; sufficient in amount to provide for extended insurance for a period of several months beyond the date of the death of insured. The Honorable Circuit Court of Appeals disposed of this contention by saying that this statement "was only a suggestion of what could be done, not a declaration of what had been done".

Petitioner respectfully submits that this conclusion and interpretation inadvertently ignores the recitals contained in the statement, and likewise inadvertently ignores the testimony of respondent's actuary, Mr. Koeppe, given with reference to the purpose of said instrument.

Attention is called especially to the following clause in said instrument:

> "Remarks: It is assumed that the agent will use every effort to prevent surrender suggesting, if necessary, the loan and paid-up alternatives."

Attention is further called to the last clause of part two of said instrument, as follows:

> "For the purpose of obtaining the cash value, each of us declares that he or she has made no assignment of said policy, and that no petition that he or she be adjudged a bankrupt has ever been filed by or against him or her."

This clause was clearly in contemplation of a possible assignment or bankruptcy proceeding and recognized that the policy had a surrender value to which an assignee or trustee in bankruptcy would be entitled.

There is nothing in this instrument to ingraft upon the inclusion of the dividend as a part of the surrender value any condition whatsoever.

The only witness who testified as to the preparation of said statement was Arthur J. Koeppe, Assistant Actuary of The Union Central Life Insurance Company. His testimony relating to this matter appears in the transcript on pages 172, 173, 174 and 175, and is as follows:

> "I am in charge of the department that directs the disposition of dividends. I had something to do with the disposition of the dividends made on this particular policy involved in this lawsuit only insofar as I have charge of the department, and know what disposition has been made in this particular case. I knew about the checks of September 9, 1931, and September 28, 1931, sent out by the company relating to the dividends. I did not see the correspondence at the time, but have since seen such correspondence. Mr. Cary examined the correspondence. He had charge of the dividend division under my direction. He is one of the division heads of the Actuary Department. He follows rules laid down by the heads of the department and by the company and then gives orders according to those directions.
>
> "I have since examined the correspondence relating to the dividends and all of them refer to or are somewhere connected up with an O. K. by Mr. Cary.
>
> "I recall the letter to the company from Lee & Lee dated September 14, 1931, now in evidence. I talked with Mr. Cary about it. Mr. Cary read that letter.

"Q. And you knew then, and Mr. Cary knew at the time that he authorized this money to be paid to Lee & Lee, that P. H. Williams had at all times since June, 1931, wished and desired those dividends on this policy in controversy here to be used in carrying that policy as far as every nickel should be used in carrying the policy as far as it would go?

"A. Any method to do that would involve the question of payment by him, and it was explained to him fully how much cash he had to pay in order to carry the policy on.

"Q. Did you send any notices to Mr. Williams explaining to him how this money could be used to carry on his insurance?

"A. Yes sir, the form sent out to him showed him exactly how much he has to pay in order to carry on the insurance, and it is furthermore stated on the letter how much he would have to pay if he wanted to change it to a quarterly basis.

"Q. Have you a copy of the letter that you sent to Mr. Williams?

"A. I think it is in the file.

"Q. I believe I was asking about any explanations that you made to Mr. Williams about these matters.

"A. The letter I refer to was sent by us to Lee & Lee, our general agents, for them to use as a basis for their correspondence with Mr. Williams. The Company did not write to Mr. Williams; we wrote to Lee & Lee a letter dated July 15, 1931. I don't think I have any more correspondence here about the same matter.

"Yes, we told Lee & Lee to explain to P. H. Williams his rights with reference to those dividends. We said: 'Please explain carefully

that voucher instruction'. That is, what it says on the form. We have a usual routine to go through. I don't know whether we went through this routine, because I haven't all the papers. After policies lapse, in trying to reinstate them, we offer inducements and write letters in order to induce the policyholders to reinstate the policies. We gave Lee & Lee the actual figures in this particular case in order to enable Lee & Lee to write intelligent letters to the insured. Such letter was sent on July 15, 1931, to Lee & Lee with reference to this policy involved in suit.

"Q. Now, it is true as late as August the Company was wanting P. H. Williams to pay some interest on the indebtedness of the policy, isn't it?

"A. Yes, sir, we wanted him to reinstate the policy. We make all effort possible to reinstate the policy. Of course, that requires the payment of interest and some premium, and you accept the note for the difference, etc. We always make that effort to reinstate any lapsed policy.

"Perhaps we did not write to P. H. Williams directly. We depended upon Lee & Lee to do that. We ordinarily would. The Company itself would look to Lee & Lee to make the arrangements. I didn't personally know that Charles A. Poteet was the local agent of the Company at San Angelo. I can't know every agent. By looking at the application for the policy I would have found Charles A. Poteet's name given on the application. We did not write Mr. Poteet direct; we deal with the general agent.

"The 1931 dividend on the policy in suit was $74.80. The surrender charge was $6 per thousand, or $60.

"Q. In other words, that surrender charge at $60 was the sum the Company was deducting from the reserve of the policy when the policy became converted into extended insurance?

"A. Well, the policy never became converted to extended insurance; it was deducted before it was determined whether the policy had any extended insurance.

"Q. Well, that deduction of $60 was $14.80 less than the amount of the dividend, wasn't it; in other words, the dividends exceed your surrender value charge by $14.80?

"A. Yes, sir.

"Q. Now, that surrender value charge is a charge made in cash against the insured?

"A. No, sir, it is not made in cash; it is a deduction.

"Q. From the reserve—cash reserve?

"A. In order to determine the tabular cash value of the policy.

"Q. Now, when you read that policy to determine his right, did you read that clause in it: 'In the event of lapse, the value of this policy shall be applied as set forth in Article 16'?

"A. Yes, sir.

"Q. And you knew at that time that the 1931 dividend was in the hands of the Company?

"A. At what time?

"Q. At the time you were determining whether or not he had any extended insurance.

"A. Yes, we knew that—that P. H. Williams had not drawn that money down.

"Q. You saw Lee & Lee's letter?

"A. Yes, sir. I saw that letter and knew that Williams wanted to reinstate the policy if he could; but he had to act.

"Redirect examination:

"Yes, I have that July letter to Lee & Lee referred to in cross examination. This is the letter, with the address at the bottom, and the date."

Here, then, we find a calculation of the surrender value of the policy prepared by the actuary department of The Union Central Life Insurance Company; said department acting, according to Mr. Koeppe's testimony, in accordance with rules laid down by the heads of the department and by the company and giving orders according to those directions—which statement includes the 1931 dividend as a part of the surrender value, and concerning which not even the respondent, at the time of its introduction in evidence, offered or made any contention that the calculation of the gross surrender value as therein given "was only a suggestion of what could be done"; yet now, because it contains an unauthorized deduction from the gross surrender value (which deduction related to a plan of the general agents never agreed to by the insured), respondent has succeeded in obtaining a holding that the instrument does not mean what it says; a holding which we respectfully submit is based wholly upon surmise and speculation and is without any other basis therefor; and is inadvertent.

Point B.

The 1931 dividend operated to purchase extended insurance under the provisions of Section 7 of Art. 4732, Revised Civil Statutes of Texas, 1925. In 1909, the Legislature of the State of Texas enacted a general code of insurance laws; Acts of the 31st Legislature Regular Session Chapter 108, page 192. Section 22 of said Act now appears as Article 4732, R. S., having been carried forward unchanged, both into the 1911 revision and into the 1925 revision. The relevant provisions of Art. 4732, R. S., are as follows:

> "No policy of life insurance shall be issued or delivered in this State, or be issued by a life insurance company organized under the laws of this State, unless the same shall contain provisions substantially as follows:
>
> * * * * * * *
>
> "7. A provision which, in event of default in premium payments, after the premiums shall have been paid for three full years, shall secure to the owner of the policy a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy, and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserve, less a sum not more than two and one-half per cent of the amount insured by the policy and of any existing dividend additions thereto, and less any existing indebtedness to the company on the policy. Such provision shall stipulate that the policy may be surrendered to the Com-

> pany at its home office within one month from date of default for a specified cash value at least equal to the sum which would otherwise be available for the purchase of insurance, as aforesaid, and may stipulate that the company may defer payment for not more than six months after the application therefor is made. This provision shall not be required in term insurances."

The policy having been delivered in the State of Texas, the proposition that said statute is read into same and governs the contract, is too well settled to call for any citation of authorities.

But the respondent contends that a declared dividend, such as the dividend under consideration, is not included within the meaning of the term "dividend additions", referred to in the statute.

In the case of *Great Southern Life Insurance Company* v. *Jones*, 35 Fed. (2d) 122, the Circuit Court of Appeals for the Eighth Circuit construed the term "dividend additions" appearing in the Oklahoma Non-Forfeiture Statute as including a declared dividend. The following quotation is from the opinion in that case (35 Fed. 2d, 125):

> "The insurance company contends that the policy in the instant case is a nonparticipating one, producing no dividends, and that the automatic extension clause, Paragraph IV, refers only to the value of $1,450 found in the table of guaranteed values; that this extension sum, being definite in amount and time, cannot be increased by the addition thereto of the coupon values, because Paragraph IV does not refer to coupon values, so that this $1,450 is the only

resource for the purchase of extended insurance upon failure to pay premiums, and that this amount was here required to pay the indebtedness against the policy. We are unable to find, however, that any such an exception has ever been made, even in the absence of statute. The courts follow almost unanimously the rule and canons of construction indicated above. The authorities cited in defendant's brief, as well as plaintiff's are to the same effect.

"But, irrespective of that, this argument runs counter to the statutes of Oklahoma. Section 6731, Comp. St. Okl., 1921, specifically provides that, in the event of the default in premium payments, after premiums have been paid for three years, the insured should be entitled to a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy, and on dividend additions thereto, if any, less any existing indebtedness to the company. So the cash reserve on the policy being sufficient to pay off the loan, the $425 due on the premium reduction coupons, *which we regard as dividends*, must, according to this section, be applied to purchasing an extended policy for $5,000." (Italics ours.)

A comparison of the Texas statute now under consideration with the Oklahoma statute under consideration in the above-cited case of *Great Southern Life Insurance Company* v. *Jones*, shows them to be identical in phraseology with respect to the provisions relating to dividend additions. The Oklahoma statute referred to is Section 6731 Comp. St. Okl., 1921 (subdivision 8), and is as follows:

"No policy of life insurance shall be issued or delivered in this State or be issued by a life insurance company organized under the laws of this State unless the same shall at least provide in substance the following:

"Eighth. That in event of default in premium payments after premiums shall have been paid for three years, the insured shall be entitled to a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy and on dividend additions thereto, if any (the policy to specify the mortality table and rate of interest adopted for computing such reserve), less a specified percentage (not more than two and one-half) of the amount insured by the policy and of existing dividend additions thereto, if any, and less any existing indebtedness to the company on or secured by the policy: Provided, that the policy may be surrendered to the company at its home office within one month of date of default for a specified cash value at least equal to the sum which would otherwise be available for the purchase of insurance as aforesaid; Provided, further, that the company may defer payment for not more than six months after the application therefor is made. This provision shall not be required in term insurance of twenty years or less."

The construction put upon the Texas statute by the Circuit Court of Appeals in this case is in direct conflict with the construction put upon the Oklahoma statute by the Circuit Court of Appeals for the Eighth Circuit in the above cited case of *Great Southern Life*

Insurance Company v. *Jones*. Furthermore, the interpretation of the term "dividend additions" in the Texas statute by the Circuit Court of Appeals in this case is in conflict with the interpretation of the term "dividend additions" as found in related sections of the same statute (which sections are *in pari materia*) by the appellate courts of Texas.

The Circuit Court of Appeals in this case held that the terms "dividend additions" and "reserve on dividend addition", as used in the Texas statute, refers solely to paid-up additions—a relatively small amount of insurance purchased with the dividend; and have no reference to declared dividends as such.

In interpreting subdivision 6 of said Art. 4732, Revised Statutes of Texas (in which subdivision 6 also occurs the term "dividend additions" in the same connection as found in subdivision 7), the Court of Civil Appeals for the Seventh Supreme Judicial District of the State of Texas in the case of *Occidental Life Insurance Company* v. *Jamora*, 44 S. W. (2d) 808, said:

> "Subdivision 6 of said article requires that a life insurance policy shall obligate the insurer, while the policy is in force, after three full year premiums have been paid, to advance to the insured on proper assignment of the policy, and on the sole security thereof, at a specified rate of interest, a sum equal to the legal reserve and *any accumulated dividend*, at the end of the current policy year, less not exceeding 2½ per cent of the amount of the policy and such *dividend*. That the insurer may deduct from such loan value any existing indebtedness on the policy" (44 S. W. (2d) 811). (Italics ours.)

In the case of *First Texas State Insurance Company* v. *Smalley et al.*, 111 Texas 68, 228 S. W. 55, the Supreme Court of Texas construed Subdivision 3 of Art. 4733, R. S. The decision was rendered in 1921. At that time the article therein under consideration by the court was numbered 4742, 1911 revision, but, as has been hereinabove stated, no changes have ever been made in those portions of the original act herein under consideration since their enactment in the year 1909. The following is copied from the opinion in that case:

> "Subdivision 3 of Article 4742 (Art. 4733, R. S. 1925) of the Revised Statutes of 1911 provides that no policy of life insurance shall be issued or delivered in this State, or be issued by a life insurance company incorporated under the laws of this State, if it contains—
>
> "a provision for any mode of settlement at maturity of less value than the amounts insured on the face of the policy, plus dividend additions, if any, less any indebtedness to the company on the policy, and less any premium that may, by the terms of the policy, be deducted; provided, that any company may issue a policy promising a benefit less than the full benefit in case of the death of the insured by his own hand while sane or insane, or by following stated hazardous occupations."
>
> * * * * * * *
>
> "In order to determine the true meaning of the obscure prohibition against provisions for modes of settlement of less value than the amounts insured on the face of a life insurance

> policy, plus *dividends* and less premiums and other indebtedness, subject to certain exceptions, resort can properly be had to the occasion for the statute's enactment, and to the remedy it was designed to afford, and to all the words of the statute." (Italics ours.)

Thus the Supreme Court of Texas interpreted the term "dividend additions", found in said section of Art. 4733, as meaning "dividends". Arts. 4732 and 4733 are clearly *in pari materia*.

Petitioner does not contend that in either of the Texas cases cited a construction of the term "dividend additions" was necessary to the decision of the case. Nevertheless, such interpretations constitute expressions by the appellate courts of the State in which the statute was enacted, and we find no basis in either of these decisions for the contention that these courts did not mean what they said when they interpreted the term "dividend additions" as including a declared dividend. A definition by State appellate courts of a term in a State statute, though *obiter*, is certainly persuasive.

The first opinion in American jurisprudence discussing the term *dividend additions* was by the Kentucky Court of Appeals. The case referred to is *United States Life Insurance Company of New York* v. *Spinks*, 13 L. R. A. (N. S.) 1053; 96 S. W. 889; Opinion on motion for rehearing, 103 S. W. 335. In that case there was under consideration the meaning of the term "dividend additions," as used in the New York Statute. The defendant therein was—like the respondent in this case—a mixed company; that is, partly stock

and partly mutual, issuing both participating and non-participating policies.

The court said, in effect, that the premiums on participating policies are loaded to provide for dividends; that the dividends simply represent a return to the policyholder of excesses in premiums charged in the operation of the participation plan. The court concluded:

> "So '*dividend additions*' mean the additions which the company made to the net premium in loading it, out of which dividends were to be distributed to the policy-holders."

In that case the insurance company had not declared the dividends but had a large unassigned surplus, and contended in the original hearing before the appellate court that the term "dividend additions" included dividends credited to the policy at the time of lapse but did not include any part of the unassigned surplus. On motion for rehearing, the insurance company about-faced and said that the term "dividend additions" did not mean this at all, but meant paid-up insurance purchased with a dividend.

The opinion on motion for rehearing appears in 103 S. W. 335. The following quotations are from the opinion on the motion for rehearing:

> "This case was orally argued before this Court *in banc*, May 2, 1907, on appellant's petition for rehearing. The original opinion was delivered October 19, 1906. Since the opinion appellant has made a complete change of its position in this case, utterly and expressly aban-

doning its former contention, and now urging that 'dividend additions' is a technical term employed in life insurance which is old and well known, and means altogether a different thing from what the court has found, as well as from what appellant originally argued.

"Appellant's change of base should detract nothing from the correctness of its present attitude, if it is correct; but it may furnish a very tangible illustration of the error of its present contention on its merits, for it may illustrate that the use of the term is not so well known, even in insurance circles, and therefore not presumably used entirely with reference to its technical sense. The question is: How did the New York Legislature employ the term 'dividend additions'? The question is one of more than incidental importance. We have the same expression in the nonforfeiture insurance statute of this State. The construction given the one would doubtless be held to apply also to the other. We are referred by counsel for appellant to certain histories of life insurance in which it appears that 'dividend additions' was a term sometimes employed in life insurance to represent additional insurance set apart by the insurer to a policy whose dividends had accumulated to a period of distribution, and which had not been otherwise applied.

* * * * * * *

Appellant's contention now is that this expression 'dividend additions' is a term of art, and has now, and always had, but the one meaning, which is those additions to the principal sum insured which the divisible surplus would

buy as paid-up insurance for the insured, payable at his death, as the principal insurance was. That form of insurance is believed to have been rare, as compared with the bulk of all insurance. That it is indulged by some companies, and possibly would be written by all, need not be doubted. But the fact remains, as is most evident by a cursory glance at the statements of any of the old line insurance companies, that the 'surplus' was not generally so employed. If it had been, the enormous surpluses, advertised as evidence of good management, and really evidences of oppressive management, could not have existed.

"But we are entitled to look beyond the technical meaning of terms used in a statute to ascertain the intent of the Legislature, if the meaning of the language of the act be obscure. One of the first, and one of the surest sources of information, is to look to the evil that was intended to be remedied. In this instance what was the evil? It assuredly was not that insurance companies were unjustly forfeiting that part of the insurance which had been paid up in full. That is precisely what a 'dividend addition' is, as described by Dawson, and now contended for by appellant. Those companies that applied the 'surplus' to buying additional paid-up insurance for the beneficiary were those whose sense of equity, without coercion from the legislatures, had led them to adopt the measure. They were not, and none others in considerable instances were, so far as we know, forfeiting such additions at all. Indeed, there was no ground whatever for doing so. As they, in any event, were fully paid up, nothing in the way of failure to pay premiums to keep up other

insurance by the assured could possibly affect them.

* * * * * * *

"The history of insurance shows that terms which might be deemed technical were frequently changed. Sometimes one term was used to express the idea, and sometimes another. They were purposely changed, we have no doubt, to mislead in some instances. Yet the matter of life insurance is of such a nature that its fundamental principles must necessarily remain the same, whatever name they may be called by. As attempted to be pointed out in the original opinion, the insured in reality insure themselves and each other. The excess of premiums collected from them belongs, in a mutual company, to them alone. An evil had grown up of forfeiting the policyholders' 'reserve' and 'surplus'. Legislation was enacted to prevent it. In construing terms employed in the statute, they will be given the meaning which will remedy the evil, rather than a meaning which would leave it partly unremedied.

"We conclude that, while 'dividend additions' may have meant what appellant contends, the term also meant that fund from which 'dividends' were declarable, to-wit: the surplus, whether it had been applied to buying additional insurance or not.

"Petition overruled."

At the time of the enactment of the nonforfeiture statute by the State of Texas, in the year 1909, the same situation existed in this State that existed elsewhere prior to the enactment of the nonforfeiture stat-

utes, as outlined in the original opinion in the Spinks case. In other words, the insurance companies, upon failure to pay the annual premium, could and did forfeit excesses in premiums charged to the insured, which said excesses resulted from the operation of the level premium plan whereby the insured paid in the earlier years of the policy not only the cost of the insurance for those earlier years, but a part of the cost of insurance for future years. The insurance companies gave insured nothing in return for these excesses; gave them nothing for dividends that had not already been paid at the time of the lapse, but simply said, on failure to pay the annual premium: "The contract is at an end; we are through with you. You have no further rights whatsoever."

The primary purpose of the Legislature in enacting the nonforfeiture statute was to give the insured and the beneficiary the benefit of such excesses and unpaid dividends in the form of insurance.

We respectfully submit that the term "dividend additions," as used in the Texas nonforfeiture statutes, includes dividends in any shape—in any form.

The Circuit Court of Appeals says that this interpretation overlooks the word "on"; that the statute has reference solely to the reserve on a paid-up addition purchased with a dividend. Now, a paid-up addition is, in a sense, a fiction in the insurance business; that is to say, no additional policy representing same is issued. The company simply says: "Here is a certain sum of money which, according to the tables of mortality, will provide for a small amount of insurance

for life." This sum is taken as a single net life premium and, together with interest which may accumulate on it, becomes the reserve of the paid-up addition. Thus, the reserve on a paid-up addition arising from or provided by a dividend is the amount of the original dividend, plus any accumulated interest.

Witness the last part of Art. 11 of the policy under the head, "Dividend Additions":

> "or applied to the purchase of paid-up participating additions to the policy, convertible into cash at any time for the amount of the original dividends or the reserve of the additions, if larger, but payment may be deferred by the company ninety days from the date of application therefor."

Article 17 of the policy labeled "Option 1—Extended Insurance", provides in part as follows:

> "The value of any paid-up addition will be used to increase the term of extension."

In construing this sentence of its policy, respondent states on page 29 of its brief in the Circuit Court of Appeals:

> "Had there been any 'paid-up additions' to the policy purchased with dividends under the terms of the 4th dividend option under Article 11, hereinbefore copied, the value of such additions, or—which is the same thing—the reserve held by the company against such 'paid-up additions', would be likewise applied to the purchase of 'Participating Term Insurance', increasing or lengthening the term of such insur-

ance. Here there were no paid-up additions. However, the contention of the plaintiff is that the dividend of June 10, 1931, should be treated as if it were a paid-up addition."

The company had in its hands the *value of a paid-up addition,* to-wit: the 1931 dividend. The insurer is concerned only with the question of whether it has in its hands the value of a paid-up addition, and we submit that it is in view of this that the appellate courts of Texas, in the above cited decisions, have interpreted the words, "dividend additions", as used in the statute, to include a declared dividend.

POINT C.

Even under respondent's theory that the 1931 dividend was merely a sum in cash, nevertheless, the insured had a right to have same applied to provide for extended insurance and timely directed that it be so applied.

Contrary to the construction put upon the policy by respondent's own actuarial department, as has been hereinabove pointed out, respondent now contends that the net surrender value should be arrived at by deducting the sum of $898.88 (the principal and interest on the policy loan note) from the sum of $910 the tabular surrender value. The difference, or remainder, is the sum of $11.12. This does not take into account at all the 1931 dividend, respondent now contending that the dividend cannot properly be taken into consideration in arriving at the net surrender value.

Section 17 of the policy provides in part as follows:

> "Accumulations of dividend at interest may be applied to increase the term of extension."

Respondent contends that the phrase "accumulations of dividends" has a limited meaning confined to a dividend or dividends "left to accumulate with interest". The only contention of respondent with reference to a tender to the insured or payment to him in cash of the dividend is based upon the transaction of September 18, 1931. Prior to that time, then, there was, under respondent's contention, simply a sum of money in its hands belonging to insured; but can respondent say with any degree or semblance of consistency that same was not "left" with it by the insured? True, no interest was ever paid or tendered on said amount, but if the dividend was only a sum of money belonging to the insured, was not respondent under a legal obligation to allow interest on said sum at a rate of interest not exceeding that specified in the contract?

Respondent's argument on the point under consideration simmers down to this: "The 1931 dividend was not an accumulation of dividends at interest because the insured did not request us to pay interest on same and we did not, in fact, allot or allow any interest to said fund". Is not this a rather narrow and unreasonable interpretation?

The following quotation is taken from the opinion of the Supreme Court of the United States in the case of *Stipcich* v. *Metropolitan Life Insurance Company*, 277 U. S. 311, 48 Sup. Ct. 512, 72 L. Ed. 895:

> "Narrow and unreasonable interpretations of clauses in an insurance policy are not favored. They are prepared by the insurer and if, with equal reason, open to two constructions, that most favorable to the insured will be adopted."

It is clear from the evidence that the insured wanted the 1931 dividend applied to carry on the insurance, and that he so advised respondent and its agents, and the jury so found.

On pages 96 and 97 of the transcript appears a letter dated September 14, 1931, from Lee & Lee, general agents of the company at Dallas, Texas, to the home office in Cincinnati, Ohio, said letter being identified by W. F. Pattison, Assistant Secretary of The Union Central Life Insurance Company. The following extract is copied from said communication:

> "Ever since June 10th we have been endeavoring through our agent at San Angelo to get Mr. Williams to sign the surrender forms which we had the Company send out, apply part of this money to the payment of any premium on one of these policies for $15,000 and the balance of the dividends made payable to Lee & Lee as a partial payment on this note. Our agent at San Angelo did not seem to press this matter with the proper amount of energy in seeing Mr. Williams personally until finally about the first of September he did see Mr. Williams and Mr. Williams told him he was not going to sign the surrender vouchers with any part of it made payable to Lee & Lee, that it was a crooked deal and that he was going to have every nickle applied towards paying these policies as far as it would carry them."

It is difficult to conceive how the home office could have interpreted said communication otherwise than that the insured considered then that he had insurance in force and that he wanted the dividends applied towards extending the policy as far as the dividend would carry same. After being so advised of the insured's understanding with reference to the existence of insurance and his desire with reference to the application of the dividend towards extending the policy, the home office did not communicate or attempt to communicate with him, but remained silent. Moreover, in the actuarial statement under date of July 15, 1931 (copied under Point "A" hereof) the home office apparently dealt with this policy as one then in existence and capable of being surrendered, and it is a fair inference from all the testimony that the home office knew that its general agents, Lee & Lee, and its local agent at San Angelo, Texas, Chas. A. Poteet, were all along seeking to deal with the insured with reference to surrendering a policy of insurance and not merely with reference to the disposition of a sum of money.

It is respectfully submitted that on the record in this case the company, as a matter of law, waived the default in the payment of the annual premium and that said waiver was operative when, in September, 1931, the home office learned of the direction given by the insured with reference to the application of the dividend towards purchase of insurance.

The following quotations are taken from the opinion of the Supreme Court of Texas in the case of *Equitable*

Life Assurance Society v. *Ellis*, 147 S. W. 1152, 105 Tex. 526:

> "A provision for forfeiture for non payment of premiums, when due, is for the benefit of the insurer and may be waived by it. No act need be done to declare the forfeiture but some act may be done that will waive it. * * *
>
> "A waiver is essentially unilateral in its character; it results as a legal consequence from some act or conduct by the party against whom it operates; no act of the party in whose favor it is made is necessary to complete it."

POINT D.

Even under respondent's contention that the 1931 dividend was merely a sum in cash unconnected with insurance benefits, respondent was a pledgee of the policy in possession of same and any sum coming into its hands to the credit of the pledgor, the insured, operated to apply as a credit on and in reduction of the amount of the policy loan note and interest.

Applying the doctrine announced in the case of *Board of Assessors of Orleans Parish* v. *N. Y. Life Ins. Co.*, 216 U. S. 517, the Circuit Court of Appeals held that the policy loan note created no debt but was a mere anticipatory collection of the reserve on the policy. It is respectfully submitted that this holding is in conflict with the Texas Statutes and the Texas decisions.

Article 4765 of the Revised Civil Statutes of Texas, 1925, provides as follows:

> "Investment in Texas Securities.—Each life insurance company now engaged or that may

> hereafter engage in transacting the business of life insurance in this State, shall, as a condition of its right to transact such business in this State, invest and keep invested in Texas securities and in Texas real estate as hereinafter provided a sum of money equal to at least seventy-five per cent of the aggregate amount of the legal reserve required by the laws of the State of its domicile to be maintained on account of its policies of insurance in force written upon the lives of the citizens of this State which reserve is hereafter denominated as its 'Texas Reserves.' And each such company securing a certificate of authority to do business in this State shall be deemed to have accepted such certificate subject to all the conditions and requirements of this chapter."

Article 4766 defines the term, "Texas Securities", as meaning all United States, State and Municipal bonds, first liens on real estate, etc., *and loans made to policyholders on the sole security of the reserve value of their policies.* (Italics ours.)

In the case of *Occidental Life Ins. Co.* v. *Jamora*, 44 S. W. (2d) 808, the Court of Civil Appeals for the Seventh Supreme Judicial District of the State of Texas held that a change made by the insurer in the amount of the loan agreement is a material alteration inhibited by Section 125 Negotiable Instruments Law, Article 5939, Revised Statutes of the State of Texas. Said Article 5939 is entitled, "Discharge of Negotiable Instruments," and said Section 125 defines what is a material alteration discharging the instrument.

In the case of *Amicable Life Ins. Co.* v. *White*, 38 S. W. (2d) 860, the Court of Civil Appeals for the

Sixth Supreme Judicial District of the State of Texas, likewise considered the policy loan advance as creating an indebtedness.

The policy loan note on its face, recites in part, as follows:

> "• • • hereby assigned to and deposit with said company as sole security for said advance and interest, Policy No. 940457, on the life of Peter H. Williams, together with the paid up additions thereto, if any."

Giving full effect to these words, the policy was pledged to the company to secure the payment of the note, and funds in its hands to the credit of insured operated to reduce the indebtedness. *Northwestern Mutual Life Ins. Co. v. Barker's Executrix*, 44 S. W. (2d) 292; *Harvey v. The Union Central Life Ins. Co., supra.*

If the doctrine announced in the case of *Board of Assessors of Orleans Parish v. N. Y. Life Ins. Co., supra*, is applicable and the loan transaction gave rise to an account between the insured and the insurer, then would not that account be represented by credits and debits, as follows:

Credits		Debits	
Tabular surrender value	$910.00	Policy advance, including so-called interest charge of $50.88	$808.88
1931 dividend	74.80	Excess of credits over debits	85.92
Total	$984.80		

Said sum of $85.92 representing the net cash surrender value available to purchase extended insurance.

Point E.

Under the record in this case, respondent is estopped to say that the 1931 dividend was not applied to provide for insurance.

"Insurance policies are traditionally contracts *uberrimae fidei*." *Stipcich* v. *Metropolitan Life Insurance Co.*, 277 U. S. 311, 48 Sup. Ct. 512, 72 L. Ed. 895.

This doctrine applies not only to the insured, but likewise applies to the insurer. As said in the case of *Phoenix Mutual Life Insurance Company* v. *Raddin*, 120 U. S. 183, 7 Sup. Ct. 500:

> "To hold otherwise would be to maintain that the contract of insurance requires good faith of assured only and not of the insurers, and to permit insurers knowing all the facts to continue to receive new benefits from the contract while they decline to bear its burdens."

In the case at bar, the defendant held on to the dividends after it had sent the 1931 notice, which, according to respondent's testimony, was mailed out to the insured some ten or fifteen days prior to June 10, 1931. The home office of the company sent him no further communication. This dividend notice sent out prior to June 10, 1931, advised him that the dividend was being applied to the purchase of insurance. The respondent says:

> "We did not pay, or offer to pay, said dividend in cash; we merely held it subject to his order."

If the respondent took the same view then as now that the dividends were payable only in cash, what reason

could it have for holding the money at all after the expiration of the days of grace? The home office had his address.

Under the respondent's theory now urged as a construction of the policy, it had no reason to expect the insured to file with it any claim for the dividend. All he had to do was simply to receive the check. When he did not receive the check he did not write in and protest to the company. Isn't it logical that if he had been considering the dividend simply as a fund in cash that he would have said something to respondent about its failure to send a check? And isn't it logical to say that his failure to say anything put respondent upon notice that, according to his understanding of the contract, the dividends were being used to purchase insurance? He did not have the policy in his possession—respondent had had same in its possession since June, 1930. Could the respondent shut its eyes to these circumstances? The letter from the general agents, dated September 14, 1931, furnished information to the home office beyond any cavil of dispute—beyond any doubt—that the insured so construed the contract and believed that said 1931 dividend was operating to purchase insurance.

Now here was a policyholder who took a view entirely contrary to the theory that the dividends were payable only in cash; who believed that the 1931 dividend was operating to purchase insurance—who had not seen his policy in more than a year, and who had refused to sign surrender vouchers which the home office had sent out in July. Why did it not occur to the company to write to him and tell him that he was

mistaken; that the dividend was payable only in cash—that he did not have any insurance? Was it even consonant with the principles of fair business dealings—to say nothing of its obligations under the doctrine of *uberrima fidei*, for respondent to remain silent as to its construction of the contract if it ever intended to construe same differently from the construction which it knew P. H. Williams was putting upon it?

Under the circumstances, was not the insurer under an obligation to speak? And having remained silent when it should have spoken, is it not now estopped from assailing an interpretation which its silence sanctioned?

When the purported dividend order was received in the home office there was received with it a note signed by the insured and payable to the order of The Union Central Life Insurance Company in an amount exceeding the amount of the dividends. Now, could the respondent look only at the order and shut its eyes to the note? Both of them arose in and were part of the same transaction—they were inseparably linked together. Respondent knew that the insured, in executing any note to it, would be executing it for only one purpose—to obtain insurance.

Here was a note in the principal amount of $914.77, dated September 18, 1931, due on or before 12 months after date, payable to the order of The Union Central Life Insurance Company. The insured must have intended the note to evidence an obligation to the company, else why did he sign it when it was made payable to the order of the company? He had consistently

refused to sign voucher forms surrendering the policy. Just a few days prior to September 18, 1931, insurer had received from its general agents a communication advising it that the insured, in effect, considered his insurance as being continued in force by the dividends and that he would not, under any circumstances, surrender the policy.

In spite of the recitals contained in the purported dividend order, the note payable to the order of the company constituted notice to it that the insured considered he still had insurance. The note looked twelve months into the future and evidenced a state of mind on the part of the insured consonant with his prior state of mind and his prior declarations and intentions with reference to continuing the insurance. Is it not a logical deduction that he believed that the note was taking the place of the dividends and was operating to continue the insurance? Why did not the company write him and say to him: "Our general agents have sent us a note signed by you, payable to our order in the amount of $914.77, due on or before 12 months after date, dated September 18, 1931. We do not understand this. You do not owe us anything. They have also sent us a dividend order payable to them, executed on the same date as the note. If you intend to cash in on the policy, why are you making a note payable to us for more than the amount of the dividend?"

Again defendant remained silent, and so far as this record shows, kept the note; and whether the company kept same or endorsed it without recourse to Lee & Lee

is immaterial, so far as this litigation is concerned. Certainly respondent did not return the note to the insured. If the company negotiated the note that constituted exercising a claim of ownership to it just as much so as retention by it in its own hands.

Mr. Humlong testified (Tr. p. 146):

> "Mr. Williams wanted to connect the note and his insurance policies up together."

Now, is there any explanation—consonant with fair dealing—of the circumstance that this renewal note in the amount of $914.77 was made payable to the order of The Union Central Life Insurance Company? If so, why did not respondent make it?

Again, when Lee & Lee, general agents, sent the note to the home office on September 19, 1931, why did not they, the said general agents, give some explanation in their letter of why this note was made payable to the order of the company? The answer to this question is plain: They did not do so because they could give no explanation consonant with fair dealing.

Now, is the respondent in any position to say, "We relied upon the dividend order?" Would any reasonably prudent man have relied upon it under the circumstances?

The following quotation is from the opinion in the case of *Leather Manuf'rs' Nat. Bank* v. *Morgan et al.*, 117 U. S. 96, 6 Sup. Ct. 657:

> "These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of jus-

tice, have sustained the general principle that where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth which he has the means, by ordinary diligence of ascertaining—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct. This principle commends itself to our judgment as both just and beneficient; for, as observed by the Supreme Court of Ohio in *Ellis* v. *Ohio Life Ins. & T. Co.*, 4 Ohio St. 667, while in the forum of conscience there may be a wide difference between intentional injuries and those arising from negligence, yet no man conducts himself 'quite as absolutely in this world as though he was the only man in it; and the very existence of society depends upon compelling everyone to pay a proper regard for the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of its rules and remedies to the enforcement of this duty. In almost every department of active life rights are in this manner daily lost and acquired, and we know of no reason for making the commercial classes an exception'."

POINT F.

Under the provisions of Article 19 of the policy, the insurer could not avoid the policy until the expiration of one month after the date of mailing notice to that effect.

The transaction of September 18th, 1931, aside, the contentions of the insurer upon which it predicates non-liability in this cause, are:

1. That the policy lapsed for failure to pay the annual premium.

2. That there was an indebtedness against the policy of such amount that when offset against the surrender value, nothing was left to provide for extended insurance.

It is clear that if there had been no indebtedness against the policy, this controversy would never have arisen.

In response to blanks for proof of death, the home office, on November 4, 1931, wrote to petitioner, that is, to her attorney, "At time of lapse the outstanding indebtedness by way of policy advance and interest exhausted all equity" (Tr. pg. 100).

The following provision is found in Article 19 of the policy:

> "Failure to repay any such advance or to pay interest shall avoid this policy whenever but not until the total indebtedness and advances hereon with interest shall equal or exceed the then loan value and not until one month after notice shall have been mailed by the Company to the last known address of the insured, and of the assignee, if any" (Tr. pg. 87).

On November 7, 1931, just one week prior to the date of the death of the insured, the home office mailed out a notice (which he, himself, never saw) as follows:

"The Union Central Life Insurance Company,
Cincinnati.

Pol. No. 940457, On the life of Peter H. Williams

Mr. Peter H. Williams,
Central Hotel,
San Angelo, Texas.

Dear Sir:

"On account of failure to pay premium due June 10, 1931, this policy, in accordance with the terms of an advance secured by the policy, became null and void on June 10, 1931, and has been canceled.

"The agreement for the advance has been marked 'Paid by cancellation of the policy' and is held by the Company solely as evidence.

"Yours very truly,

(Sgd.) W. Howard Cox,
Secretary."

October 7, 1931.
HH.

It was only by virtue of the indebtedness or the policy advance that the policy, even under respondent's theory, could have been avoided, and the insured's rights with reference to extended insurance, wiped out.

It is respectfully submitted that under the above quoted provision of the policy, this result could not follow until the expiration of one month from the date of the mailing of said notice; and the insured having died long before the expiration of the said month, the contention of the insurer that insurance was not in existence at the date of his death, is untenable and inconsistent with its course of conduct during this lifetime.

It is to be noted that said notice was not mailed or sent out until after the transaction of September 18, 1931, which said transaction was, by the verdict of the jury, determined to be of no force or effect.

Said verdict has ample support in the evidence.

The attorneys for respondent are Mr. Stanley K. Henshaw, of Cincinnati, Ohio, and Messrs. Eugene P. Locke and Ralph Randolph, of the firm of Locke, Locke, Stroud & Randolph, of Dallas, Texas.

Conclusion.

The Circuit Court of Appeals, in its opinion herein, in connection with the discussion of dividends and "dividend additions", cites two Kentucky cases: *Mutual Life Ins. Co. v. O'Brien*, ... Ky. ..., 116 S. W. 750, and *Jefferson v. N. Y. Life Ins. Co.*, 151 Ky. 689, 152 S. W. 780. The holding in these two cited cases is qualified and restricted in a comparatively recent decision by the Kentucky Court of Appeals. The following language is quoted from the opinion in *Northwestern Mutual Life Ins. Co. v. Barker's Executrix*, 241 Ky. 490, 44 S. W. (2d) 292:

"It has been held several times by the court that an earned and distributable dividend must be taken into account in ascertaining the amount available for the purchase of extended or non-participating term insurance, which is a form of surrender value, upon lapse of the policy for default in payment of premiums. *U. S. Life Insurance Company* v. *Spinks,* 126 Ky. 405, 96 S. W. 889, 29 Ky. Law Rep. 960, 13 L. R. A. (N. S.) 1053, extended opinion 126 Ky. 405, 103 S. W. 335, 31 Ky. Law Rep. 185; *Mutual Life Insurance Company* v. *Davis,* 115 Ky. 404, 73 S. W. 1020, 24 Ky. Law Rep. 2291; *Emig's Adm'r* v. *Mutual Benefit Life Ins. Co., supra; Mutual Benefit Life Ins. Co.* v. *Emig's Adm'rs,* 145 Ky. 660, 141 S. W. 38. And it has been specifically held that in arriving at the value of a policy in a settlement between the parties to a loan the dividends to which the insured was then entitled to receive must be considered. *Northwestern Mutual Life Ins. Co.* v. *Fort's Adm'r,* 82 Ky. 269; *Mutual Life Insurance Company* v. *Twyman,* 122 Ky. 513, 528, 92 S. W. 335, 97 S. W. 391, 28 Ky. Law Rep. 1153, 30 Ky. Law Rep. 901, 121 Am. St. Rep. 471. The cases of *Mutual Benefit Life Insurance Company* v. *Dunn,* 106 Ky. 591, 51 S. W. 20, 21 Ky. Law Rep. 13; and *Jefferson* v. *New York Life Insurance Company,* 151 Ky. 609, 152 S. W. 780, are distinguishable as the right to dividends in neither case was a vested one. *The rights were contingent and the dividends were payable in the future.*" (Italics ours.)

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its

supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 208

NANNIE MAY WILLIAMS, PETITIONER,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY, RESPONDENT.

SUPPLEMENTAL BRIEF OF PETITIONER.

The brief in support of the petition for writ of certiorari and this supplemental brief are submitted as petitioner's brief on the merits.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is reported in 65 F. (2d) 240.

II.

Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals is May 25th, 1933; the date of the judgment of the trial court is October 21st, 1932.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 347, Title 28 (U. S. C. A.), U. S. Code; Section 240 of Judicial Code as amended February 13, 1925; 43 Statutes 938.

3. The petition for writ of certiorari was granted October, 9, 1933.

Statement of the Case.

In addition to the statements contained in the petition and supporting brief, it is deemed proper to submit a supplemental statement relating to the "second phase of the case". As stated in the petition, the whole controversy revolves around two principal questions:

1. The applicability and the application of the 1931 dividend for insurance benefits.

2. Whether the insurer is relieved of liability by the transaction on September 18, 1931, in which insured signed a dividend order in favor of Lee & Lee, General Agents of respondent, covering the dividend on the policy and several others, and in which transaction the insured executed a note in the amount of $914.77, payable to the order of The Union Central Life Insurance Company.

With reference to this transaction, which is referred to by the phrase, "second phase of the case", petitioner pleaded mental incompetency of the insured, mistake and fraud.

Respondent's contentions are, as we understand them: First, That there was no insurance in force on September 18, 1931, or at any time after July 11, 1931, the date of the expiration of the days of grace; Second, If there was insurance in force extending the policy beyond the date of the death of the insured, said insurance was wiped out by the transaction of September 18, 1931, and the payment by the

insurer to its General Agents of the amount of the purported dividend order.

Believing that the first contention is fully answered by the authorities cited and propositions submitted in the brief filed with the petition, petitioner will restrict the scope of the supplemental brief to a discussion of the second contention, or second phase of the case.

The so-called "dividend order" relied on by respondent appears on pages 150-151 of the transcript, reading as follows:

"September 18, 1931.

STATE OF TEXAS,
County of Irion:

To the Union Central Life Insurance Company of Cincinnati, Ohio:

GENTLEMEN:

You are hereby authorized and directed to pay to Lee & Lee, of Dallas, Texas, the sums due me as dividends on policies now lapsed, as follows:

Policy:	Amount of dividend.
#937853	$112.20
#940457	74.80
#989356	184.75
#989357	184.75
#989358	110.85
Total Amount of Dividends	$667.35

(Sgd.) P. H. WILLIAMS.

Witness:
(Sgd.) GEO. T. LEE."

George T. Lee, an attorney and the son of one of the general agents, went with his brother-in-law, Hervey Humlong, to the farm of P. H. Williams, and secured his, the

said Williams', signature to said instrument. At the same time the insured signed a note in the amount of $914.77, due on or before twelve months after date and payable to the order of The Union Central Life Insurance Company. (Tr., page 99.)

P. H. Williams was indebted to said Lee & Lee in the amount of $1,643.63, with interest from June 20, 1930, at the rate of six per cent per annum, said indebtedness being evidenced by a note due on or before six months after June 20, 1930.

As the cash resources of the said Williams had dwindled to such an extent that he was unable to pay said indebtedness or any part thereof, the said general agents and the local agent at San Angelo, Charles A. Poteet, had for some time been endeavoring to persuade or induce the insured to "cash in" on his insurance policies, to sign surrender forms, and to transfer to the said Lee & Lee all the sums accruing to him under said policies. It appears that it was suggested to him that he might use a part of the money to continue one policy,—a $15,000 policy,—in force for a full year, under which arrangement Lee & Lee would obtain approximately $500.

To these suggestions the insured returned, in the words of the general agents, a "cold-blooded refusal"; said, "It was a crooked deal, and that he was going to have every nickel applied towards paying these policies as far as it would carry them." (Transcript, page 97.) According to the letter from Lee & Lee to the home office of respondent, said letter appearing on pages 96 and 97 of the transcript, they had been endeavoring ever since June 10, to work out some such arrangement; and with no success whatever.

Accordingly, they had Mr. George T. Lee prepare the "dividend order" herein above set forth, and the note to The Union Central Life Insurance Company, in the amount of $914.77; and sent him from Dallas, Texas, to San An-

gelo, Texas, where he joined Mr. Humlong before proceeding to the farm of Mr. Williams, some twenty miles distant from San Angelo.

The jury found that on September 18, 1931, the said P. H. Williams did not have sufficient mental capacity or sufficient reason to understand the nature and effect of said transaction.

"And the finding of the jury upon that question must be allowed to stand unless all reasonable men exercising an unprejudiced judgment would draw an opposite conclusion from the facts." *Story Parchment Company* v. *Paterson Parchment Paper Company*, 282 U. S. 555, 51 Sup. Ct. 248. (Quotation is on page 252, immediately preceding Section (7) 51 Sup. Ct.).

Petitioner assumes that this Court will, under the applicable doctrine announced in the above-cited case of *Story Parchment Company* v. *Paterson Parchment Paper Company* (conclusion of opinion, p. 252 of 51 Sup. Ct.), consider respondent's assignments challenging the sufficiency of the evidence to show mental incapacity, fraud or mistake.

The petition for writ of certiorari seeks a complete review and determination of the entire cause; the prayer concluding as follows: "To the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by the court, and for such further relief as to this Court may seem proper."

Seeking an affirmance of the judgment of the trial court, petitioner submits, under subdivision IV hereof, a specification of points answering respondent's assignments relating to the sufficiency of the evidence to show mental incapacity; and relating to the questions of fraud and mistake.

IV.

Specification of Points.

1. The verdict of the jury, involving a finding that the insured did not have sufficient mental capacity to understand the nature and effect of said transaction of September 18, 1931, is based upon competent and sufficient evidence.

2. The purported dividend order dated September 18, 1931, is unavailing to respondent because same was procured by fraud.

3. Even under respondent's contentions and under respondent's own evidence, the purported dividend order was signed by the insured under a mistake as to his rights; said mistake being induced by acts and representations of respondent and its agents.

V.

ARGUMENT.

Point I.

The verdict of the jury, involving a finding that the insured did not have sufficient mental capacity to understand the nature and effect of said transaction of September 18, 1931, is based upon competent and sufficient evidence.

The testimony relating to this feature of the case covers approximately 53 pages of the record (pages 102-143, 145-158). Some fifteen witnesses testified—including the plaintiff, and Mr. George T. Lee, who testified by deposition, and Mr. Humlong, who accompanied Mr. Lee on the occasion in question.

To set out herein in anything like a comprehensive manner all the testimony of these witnesses, would extend this brief to great length; and unnecessarily so, as it would simply involve copying into the brief what appears in the transcript.

We respectfully submit that the evidence, while conflicting, was such that reasonable minds might draw different conclusions, one of which conclusions would sustain the plaintiff's claim, and the jury having resolved the conflicts in favor of the plaintiff (petitioner), the verdict should stand. *Story Parchment Company* v. *Paterson Parchment Paper Company*, 282 U. S. 555, 51 Sup. Ct. 248; *Wharton* v. *Aetna Life Insurance Company*, 48 F. (2d) 37, (Certiorari denied, 52 Sup. Ct. 9); *Sprencel* v. *United States*, 47 F. (2d) 501.

The following quotations are taken from respondent's brief in opposition to the petition for writ of certiorari, pages 113-114:

> "The evidence in this case fairly shows that Williams had been undergoing a change in his physical and mental condition prior to the date on which he signed the instrument in question. That he was a sick man suffering from a physical malady, which a month later, resulted in his death, cannot be denied. As a result of financial reverses and sickness, he was despondent. On two occasions he had contemplated suicide, but reason seems to have prevailed with him each time, as he continued to live, and died a natural death. He showed some evidence of absent-mindedness, and forgetfulness, also in matters such as the counting of numbers and orders given to hired hands. He kept more to himself than formerly, had less to say to acquaintances, and exhibited less interest in them. He had become irritable, and cross on occasions." * * * "The fact that Williams had about three degrees of fever on the morning of the 18th of

September, and that his gums undoubtedly had bled some during the twenty-four hours following the extraction of the teeth, and preceding the conversation with George Lee and Humlong and the act of signing, shows beyond peradventure that the deceased was in a weakened condition." (Quotation begins with last paragraph on page 113.)

Yet respondent anathematizes the plea of mental incapacity as a "fanciful claim"; and points to Mahatama Gandhi, across the seas, as a "striking illustration of a man intensely weak physically and yet intensely strong intellectually." (Page 114 of same brief.)

Before proceeding with the further discussion of the evidence, we pause to consider the legal criterion of mental incapacity.

The following quotation is taken from 32 Corpus Juris, 727, Section 496:

"Nature and Extent of Incapacity to Contract—(1) In General. The test of mental capacity to contract is whether the person possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged; and in order to avoid a contract it must appear not only that the party was of unsound mind or insane when it was made, but that this unsoundness or insanity was of such a character that he had no reasonable perception or understanding of the nature and terms of the contract. *However, the insanity need not be so great as to dethrone his reason or as to amount to an entire want of reason,* but it is sufficient if he is insane to such an extent *as to be incapable of comprehending or understanding the subject of the contract and its nature and probable consequences.* The incapacity may result from lunacy, idiocy, senile dementia or imbecility, *or any other defect or disease of the mind, whatever the cause,* including that resulting from habitual drunkenness" (Italics ours).

The following quotation is from Texas Jurisprudence, Volume 24, page 377:

> "'Capacity' is a comparative term that varies according to the act to which it is referred. A person may be quite capable of performing certain reasoning functions of the mind, yet be wholly incapacitated as to others. 'The general definition of the term "mental capacity" seems to contemplate the ability to understand the nature and effect of the act in which a person is engaged and the business he is transacting.' In lunacy inquisitions and proceedings to appoint guardians for persons of unsound mind, the general mental condition of the subject is in issue; but in other cases the law is concerned chiefly with the question *as to the ability of the person to comprehend the effect or consequences of the particular act under investigation.* For example, *the test of the mental capacity of a person to make an ordinary contract is the ability to understand the nature and probable consequences of his act of entering into the agreement*" (Italics ours).

The evidence shows that for many months prior to September 18, 1931, a fatal disease, cirrhosis of the liver, had been sapping the life of P. H. Williams. The said malady was accentuated and its course hastened by an injury which he sustained during the early part of August, 1931, when he was kicked in the abdomen by a bull "yearling." From then on, he was afflicted with headaches, hiccoughs, shortness of breath, and fever, almost constantly until the date of his death, October 15, 1931, he being then 55 years of age (Transcript, page 103).

A general mental decline was noted by most of those closely associated with him; evidenced by loss or lapse of memory, moroseness, unsociability, excessive worry, and changes in his general personal characteristics. Normally active, energetic, optimistic, sociable, and easy-going, he became so morose as to talk of suicide. These changes

were noted by some in the latter part of 1930, or in the early part of 1931, and by others in the spring and summer of 1931 (Transcript, pp. 118, 119, 121, 122 3, 125, 127, 129, 130).

Mr. Williams had been engaged on a large scale in the oil business. In the latter part of the year 1930 and early part of the year 1931, he had suffered heavy financial losses, as the result of which he faced financial ruin. He abandoned the business of drilling wells for a life on the farm.

The testimony of two farm hands, Jordan and Mabry, shows that after the injury in August, he gave orders impossible of execution, became unreasonable in his exaction and requirements as to the conduct of the farmwork; would frequently forget orders he had given and upbraid them for doing the very things he told them to do. He would sit at the steering-wheel in his car in the field apparently in a stupor, oblivious to his surroundings (Transcript, pp. 118, 123).

Another witness observed him in his car on the streets of San Angelo, sitting at the steering-wheel for as much as forty five minutes, bowed and bent over the wheel, and paying no attention whatsoever to what was going on about him (Transcript, page 128).

Broken in health and broken in spirit, he had been crushed by overwhelming odds.

The latter part of August and the early part of September, 1931, Mr. Williams went through extensive physical examinations at the San Angelo Medical and Surgical Clinic. The X-ray and laboratory findings indicated that he was suffering from a serious disorder, the physican in charge of the case, Dr. Nibling, being of the opinion that he was suffering either from a condition of malignancy or

cirrhosis. No definite diagnosis was made. X-rays of the teeth disclosed several pus pockets.

On the morning of September 17, 1931, all of his teeth, some fourteen in number, were extracted; a local anesthetic was used.

In the afternoon of that day September 17 he was taken from San Angelo to his farm in Irion County, a distance of twenty miles. He spent a sleepless night.

Mrs. Williams testified: "He didn't sleep any that night and he didn't rest a particle. He had the hiccoughs all night, and his teeth bled all through that night clear through the pillow, terribly. (Transcript, page 105).

She further testified that he had fever that night and the next morning. She testified that she took his temperature between seven o'clock and eight o'clock on the morning of September 18, and it was between 100 and 102 (Transcript, page 105). She further testified:

> "About 10:30 the morning of September 18, the morning after he had his teeth pulled, two men came out. I heard someone in the front room, the living room, and I went to the dining room door, which opens into the living room, and Mr. Williams was sitting in the chair, and two other men were sitting there. I did not take part in the conversation. I was trying to clean things up, and I had not even started dinner when the men came. I started dinner about 10:30, immediately after they came, in order to have it ready by noon. The men were still talking to Mr. Williams at noon, when Mr. Jordan, a hired man, came in for dinner. We waited dinner a little bit, and then we went ahead and ate. He finished dinner, and had been gone about ten minutes, when those men left, about 12:30 or a little later.
>
> "The men were there, anyway, two hours. I could not repeat their conversation one sentence after another. I was in the dining room. Between it and the

living room there was a place for a door, but no door, just curtains hanging on each side. I did not pay any attention to them until I heard the name 'Poteet' repeated several times. I knew by repeating "Poteet" they were talking about life insurance (Mr. Poteet was respondent's local agent at San Angelo).

"One man would talk and then the other would talk. One would say, "It is this way, Mr. Williams," and they would talk and talk. Then Mr. Williams would say, "Well, gentlemen, I am a sick man today; I am not able to do anything today. I will be in town in a few days and see you there." About the time he would get the sentence halfway out, the other man would start up and say: "But this is how it is, Mr. Williams"; and by that time the other man would come in. They kept that up until about 12:00 o'clock.

"Q. Did you hear Mr. Williams say that he would sign or was willing to sign?

"A. I didn't know there was anything concerning signing; I just heard them say those words. Every sentence he would start, he would tell them he was a sick man and was not able to talk to them.

"I did not hear them talk about anything else; I didn't hear them talk about livestock or farming or anything of that kind.

"The house is just a little box house, of five small rooms. The living room was 10 x 20 and it was twice as large as any other room; the rest of them were 10 x 10. September 18, 1931, was a very hot day. Everything was open. The doors between where I was preparing the meal and the room where the business transaction was taking place were open. While in the dining room, whenever I listened, I could hear the conversation clearly. I could see Mr. Williams from where I was working. He was sitting in a big rocking chair, kinda stooped down this way part of the time, and part of the time kinda moving around. A cuspidor was at his side.

"No one else was in the house. There were some Mexicans living about two blocks away.

"A little after those men left I went in there. Mr. Williams was just slumped down in his chair, like this, down and out, with his arms this way. He let me take him by the arm and help him up, but he said he did not want any dinner. I insisted that he go to the table, and I poured him some coffee, which he just tasted. I helped him to the bed in his room, where he sat down on the bed and took some aspirins, and I slipped his shoes off and straightened him out on the bed. I put a wet towel on his forehead. I took his temperature, and it was between 102 and 103 and that scared me, and I telephoned to my son in San Angelo to bring some ice out and to take us back to the doctor.

"My son came. We waited until it got cooler, and then we took Mr. Williams back to town, after sun down.

"Dr. Nibling was out on a case, but we summoned Dr. McAnulty to give Mr. Williams a hypo, as Mr. Williams was hiccoughing so terribly.

"Mr. Williams didn't rest at all. His teeth bled almost in a stream this whole time, from the time they had been pulled out. Mr. Williams slept until about 3:00 o'clock. He waked up with the hiccoughs, and they were as bad as before he went to sleep. He had a high fever. His teeth were bleeding almost in a stream. I called Dr. Nibling, who knew of a nurse in the hotel, and he said to have the nurse pack some cotton hard against Mr. William's gums, and have Mr. Williams bite down on the cotton, and we did this. Dr. Nibling came the next morning.

"From that time on Mr. Williams was a mighty sick man. We changed to Dr. Marberry about the first of October" (Tr., pp. 105-108).

Of similar import is the testimony of Jeff Jordan, the farm-hand (Tr., pp. 116-118).

The testimony of Mrs. P. J. Webb is quoted in full as follows:

"I live at the Central Hotel in San Angelo. I am the proprietress, and have been almost seven years.

"I was acquainted with P. H. Williams during his lifetime. I knew him fully five and a half years. Soon after I commenced running the hotel he and his wife stayed there for about two years and a half.

"I recall Mr. Williams' accident at his farm during August, 1931. I first saw him when he came to the hotel, possibly a week afterward, and asked if I had a room where he might lie down for a short time and rest; that he felt bad. He stayed until late in the evening, until it was cooler, before he went back to his farm. It was a Saturday afternoon—I think it was August 22nd. He had been to see a doctor and had some medicine that he took after he got to the hotel. He complained of a headache and a hurting in his side, and I bathed his face with a towel and ice water. His temperature was very high, around 104. I had been a practical nurse. He was back again on the following Monday. At that time he went to his daughter-in-law's room and lay down the biggest part of the day. For the next several days he was very sick, and someone would drive him back to the farm in the evening and bring him in the next day. He came in almost every day until about September 11th, when he registered for a room. He was coming in to see the doctor a part of the time, going to the Clinic. One day he had the doctor up to the hotel before he took a room. He was hiccoughing and had the doctor to get some relief.

"I remember that he had his teeth extracted on the morning of the 17th of September. After going to Dr. Chase's office and having all of them extracted, he came back awfully nervous and sick, and went to his room and lay down, but not until after he had rested at the head of the stairs awhile. He was up and down. His gums were bleeding terribly and he had to sit up most of the time, on account of so much blood coming from his mouth. After sundown he went out to the farm.

"I saw him the next evening, late, between sundown and dark. When he came in his gums were

bleeding terribly and he was exhausted and sick. We got him in his room as soon as he was able to go there, and called for a doctor. Dr. Nibling was out, and Dr. McAnulty came, about eleven o'clock, gave Mr. Williams a hypo and tried to check the excessive bleeding of the gums. About thirty or forty minutes later Mr. Williams dropped off to sleep a little bit. Then he waked up again, and his mouth was so filled with blood he began spitting up blood. That frightened his wife, and we tried to get a doctor again; it must have been around 2 o'clock in the morning. He said to have the nurse in the house on another case pack his gums, and the nurse took some cotton and packed them and tried to stop the bleeding. Mr. Williams did not leave the hotel any more after that, and he died at the hotel.

"When I first knew Mr. Williams he was a very active man, brimful of energy. He was so full of energy that he went day and night at times. He was in the oil business. I noticed a change or difference in Mr. Williams several times, about July and August, especially throughout the month of August I could tell that he was failing. He looked weaker, and didn't have the strength to do as he had done before.

"While Mr. Williams was at the hotel, he did things I had never seen him do before. I would try to give him the medicine and he would just refuse to take it; he would spit the medicine right into my face. And on one occasion he grabbed me by the arm and clinched it and stuck his nails into my flesh until it brought blood, and he had never done anything like that before. That was, I should judge, about eight or ten days before his death. I don't recall any other incident showing a change in Mr. Williams" (Tr., pp. 120-122).

The testimony of Dr. A. J. Marberry, in full, is as follows (Tr., pp. 113-116):

"I have lived in San Angelo about thirty years. I have been practicing medicine since 1881. I treated P. H. Williams professionally about the last of Sep-

tember, 1931, and attended him up until about the time of his death. The cause of his death, in my opinion, was cirrhosis of the liver and abdominal dropsy or ascites. In the usual case of cirrhosis of the liver the disease is very slow and long-continued, some of them lasting many years. In most cases there is enlargement in the beginning and shrinkage later. Where cirrhosis runs a normal course, there would not be much reaction upon the mind or brain, but where there is a good deal of infection or ascites, shortness of the breath and weakness of the heart, there would be a reaction on the mind as well as on the body. The patient would be feeble all over.

"By 'ascites' is meant an accumulation of water in the abdomen. I tested Mr. Williams three times for water, and on the first time I drew off about two gallons, and almost that much the other times. The water accumulated very rapidly, more so than I have ever seen.

"An injury inflicted to the right side in the region of the liver I think would aggravate the ascites condition. In this particular case, the fluid accumulated probably was caused by an injury to the blood vessels, a plugging of the veins. The blood, being dammed back, could not get through the liver back to the heart. It would be like pumping water into a bag that would let the water leak out. That same thing takes place in the blood vessels. They are distended or strutted. The heart pumps the blood into the spleen, intestines and all those things. The arteries pump it in and the veins carry it back. From the abdominal cavity it has to return to the heart through the liver. If it cannot go back as fast as it is pumped in, there is a distention of the vessel that causes a hemorrhage from the stomach, bowels, etc.

"The liver is the organ that principally burns up or destroys the poisons of the system, of the blood; it purifies the blood as one of its functions. In Mr. Williams' case, the liver was exceedingly small. Normally it would weigh three or four pounds, but his

liver would have weighed probably two pounds. This would indicate that the glandular substance of the liver had been destroyed and replaced by a fibrous tissue that has no function; it is the glands in the liver that purify the blood.

"Q. Now, the condition of the liver, does it have anything to do—does this ascites condition or general condition you found Mr. Williams to be in—would you say that condition would have any reaction or operate upon his mind or mental capacity?

"A. Well, you might say indirectly.

"Q. In what way?

"A. In the first place, the extreme distention of the abdomen and the rendering of the breath very shallow, and he was very short of breath, panting for breath—that would be one thing; and it would weaken the heart. The blood being dammed back, the heart forcing the blood in trying to get to it around—it would overpower the heart, the heart would become weakened, depending upon the nature of the case, the amount of fluid accumulated, etc.

"Q. Would that condition in your opinion be reflected in his mental state in any way?

"A. Indirectly. As the liver cannot purify the blood, the blood becomes toxic or poisoned. That would of course react, and cause, in some cases, a little fever; in other cases a muddy, ugly condition of the skin. Of course, toxic conditions would always affect the general system as well as the mind. The history of the case showed that he had infected teeth. That, of course, would poison the blood, and the liver would be unable to destroy those poisons. Then, again, he had no acid in the stomach; the stomach glands were destroyed, and there was soapy mucus, showing an inflammatory condition of the stomach. The stomach secretes hydrochloric acid, which acts as an antiseptic to destroy the intestinal poisons. Then there are poisonous materials in the stomach that are absorbed from the stomach and from the duodenum and the intestines.

"Poisons or toxins accumulate, and the liver is not able to destroy them. A toxic and weakened condition results—a weak heart, weak respiration, shallow breathing. All of these things taken together, with the toxic condition, would of course enfeeble the whole system. He was extremely feeble, barely able to walk at all—not only feeble in body, but all the way around. You would not call it insanity, but a feeble, incompetent condition, you might say. The body was of course feeble, too, very, very, feeble.

Cross-examination:

"I made no X-rays. When I first saw Mr. Williams there wasn't anything to do except draw the fluid as a palliative measure. He was in a manner dead. After the fluid was drawn off, about the only change was that he would breathe a little better. Yes, this disease of the liver is one of long, slow development. Before it reaches an acute state when you have to tap a man, his condition of course varies, and he has his ups and downs; that is true of every disease."

Dr. F. S. White, a physician and a specialist in nervous and mental diseases, honored by the State of Texas with positions of trust and confidence, testified:

"As to what schools of medicine I am a graduate of, I graduated first from the Central College of Physicians and Surgeons at Indianapolis (now merged with the University of Indiana), and since then I have taken several post-graduate courses in New York. I have been practicing medicine since 1884, being in the general practice ten or twelve years; and since then, for at least 25 years, I have been specializing in nervous and mental diseases. I have been superintendent of all the hospitals of the insane in Texas, except the one at Rusk. My official connection lasted 15 or 20 years. Then I operated a private sanitarium at Wichita Falls for nervous and mental diseases. I am engaged in private work at San Antonio now. The

state asylums or hospitals I was connected with were at Terrell, Austin, San Antonio and Wichita Falls'' (Tr., pp. 131-132).

In answer to a hypothetical question briefly outlining plaintiff's testimony, and asking his opinion as to the mental power and capacity of P. H. Williams on September 18, 1931, to weigh, understand, and consider the nature and effect of a business transaction, Dr. White, after the court had overruled somewhat lengthy objections to the question, gave the following answer:

> ''I will answer that question assuming all of these statements are true; and assuming that, my opinion would be that he was not in a condition to know the nature and effect of the signing of the paper'' (Tr., p. 139).

The principal objection made by respondent to the question propounded to Dr. White was that the sum total of the evidence introduced forming the basis for the framing of the hypothetical question was insufficient for such purpose; respondent contending that no case had been made out by such evidence from which it might be reasonably inferred that at the time the instrument was signed by Mr. Williams he was incapable of understanding the nature and effect of the transaction.

Other objections related to alleged inaccuracies and alleged exaggerations.

From respondent's brief in opposition to the petition for writ of certiorari, we gather that respondent concedes the alleged inaccuracies, with one exception, to be of minor significance and immaterial.

Concerning the alleged immaterial inaccuracies, respondent says on pages 134-135 of its brief:

> ''A few other minor exaggerations or unsupported statements could be mentioned. Perhaps such ex-

aggerated statements or misstatements would not be sufficient in and of themselves to require a reversal on account of the Court's admission of the doctor's answer, over the objection of [redacted] defendant's attorney, if it were not for the further fact that such question contains a misstatement which we believe should be regarded as material and highly prejudicial, and, therefore, so important an error as to require a reversal."

"The misstatement now referred to is as follows:

> "In the afternoon or early in the evening or night of September 18th he became—to those surrounding him, to his wife—so weak and his gums bleeding so much that she returned with him to San Angelo, to the Central Hotel, arriving there on the night of September 18th" (Tr., p. 207).

"Mrs. Williams was the only one to testify as to what happened on the afternoon of the 18th, and her whole testimony on said subject is as follows:

> "'I helped him to the bed in his room, where he sat down on the bed and took some aspirins, and I slipped his shoes off and straightened him out on the bed. I put a wet towel on his forehead. I took his temperature, and it was between 102 and 103, and that scared me, and I telephoned to my son in San Angelo to bring some ice out and to take us back to the doctor.
>
> "'My son came. We waited until it got cooler, and then we took Mr. Williams back to town, after sundown' (Tr. pg. 107).

"It is seen from such quotation that Mrs. Williams decided to go back to town and summoned her son for such purpose solely because she was scared after taking Williams' temperature and finding that it was between 102 and 103. She made no reference to his condition of weakness or to his bleeding gums as being any cause for the decision to return to San Angelo."

We quote from the further testimony of Mrs. Williams on the same page of the transcript, 107, commencing with the sentence immediately following the above quotation by Respondent:

> "Dr. Nibling was out on a case, but we summoned Dr. McAnulty to give Mr. Williams a hypo, as Mr. Williams has hiccoughing so terribly.
>
> "Mr. Williams didn't rest at all. His teeth bled almost in a stream this whole time, from the time they had been pulled out. Mr. Williams slept until about 3:00 o'clock. He waked up with the hiccoughs, and they were as bad as before he went to sleep. He had a high fever. His teeth were bleeding almost in a stream. I called Dr. Nibling, who knew a nurse in the hotel, and he said to have the nurse pack some cotton hard against Mr. Williams' gums, and have Mr. Williams bite down on the cotton, and we did this. Dr. Nibling came the next morning."

Dr. Nibling testified that on the night of September 18th, when he was called over the telephone, he advised that Mr. Williams' gums be packed "until he could see the dentist with reference to stopping the hemorrhage from the gums."

He further testified that on the 20th and 21st of September, Mr. Williams was spitting blood, "holding ice in his mouth, trying to stop the hemorrhage" (Pages 110-111, Tr.; bottom of page 110, top of page 111).

Mrs. P. J. Webb, referring to the condition of Mr. Williams when Mrs. Williams took him to the hotel in San Angelo on the evening or in the early night of September 18th, testified:

> "When he came in, his gums were bleeding terribly, and he was exhausted and sick. We got him in his room as soon as he was able to go there, and called for a doctor. Dr. Nibling was out, and Dr. McAnulty came, about eleven o'clock, gave Mr. Williams a hypo

and tried to check the excessive bleeding of the gums. About thirty or forty minutes later Mr. Williams dropped off to sleep a little bit. Then he waked up again and his mouth was so filled with blood, he began spitting up blood" (Tr., pg. 121).

Thus it appears that Mr. Williams' gums were bleeding excessively in the afternoon and night of September 18th, and continued to bleed even as late as September 20th or 21st.

In view of this testimony the objection made by Respondent falls.

We further submit that the alleged "minor discrepancies" referred to in Respondent's brief fade away when the testimony as a whole, and not simply an isolated portion or paragraph, is considered.

However, as Respondent concedes said alleged minor discrepancies to be immaterial, we forbear detailed discussion of same.

There remains only the principal objection made to the hypothetical question, that is, the objection as to the sufficiency of the evidence upon which the question is based. This objection is so related to Respondent's general assignment challenging the sufficiency of the testimony that a separate discussion thereof would be mere repetition.

The hypothetical question was propounded after plaintiff had put on the stand twelve witnesses; after all of plaintiff's evidence on the question of mental incapacity had been adduced, with the exception of the testimony of Dr. White, he being the last witness before plaintiff rested.

The record in this case shows that Dr. White sat in the court room and heard that evidence (Tr., pg. 140).

He stated that, according to his recollection of the testimony, "practically everything had a basis in the evidence which he (counsel) included in the hypothetical question" (Tr., pg. 140).

He mentioned one matter—not included in the hypothetical question—relating to testimony that on the occasion in question, the insured remarked he was a sick man.

No objection was made as to the form of the hypothetical question or as to the form of the answer thereto.

Some courts have shown a tendency to adopt the popular skeptical attitude towards all alienists. The fact that in some instances this attitude may be well-founded, gives no warrant for scoffing at the opinion of *all* specialists in that line; any more so than in the case of other classes giving opinions as experts—as attorneys, diagnosticians, surgeons, engineers. Divergence of opinion among professional men constitutes no argument that the opinion of *every* professional man is entitled to no weight.

Especially is this true as to one shown to be eminently qualified, as in the case of Dr. White; moreover, shown to have held high positions of trust and confidence. To these considerations we attach the greatest importance in every line of human endeavor; in every avenue of thought; why then, disregard them when the subject of mental powers is under inquiry?

Psychology is as nearly an exact science as is medicine. Again, the relation of body to mind can not be denied, respondent's cited illustration of Mahatma Gandhi to the contrary notwithstanding.

While not of universal application, the old Roman maxim, *mens sana in sano corpore,* was based upon human experience.

Here then, we have a witness of unchallenged professional standing, with an unsullied record of a life devoted to the study of the human body and the human mind; a physician specializing for a quarter of a century in nervous and mental diseases; honored by the State of Texas with positions of trust and confidence; entrusted at different times with the

care and supervision of the unfortunate inmates of every state asylum for the insane (with one exception).

Upon the evidence adduced by plaintiff and outlined in the hypothetical question, he found a sufficient basis for an opinion as to the mental incapacity of the insured on September 18, 1931.

Under the record in this case, and in view of the eminent ability of the witness, is not the fact that he so found such sufficient basis, a circumstance worthy of consideration—though not necessarily controlling—in judging of the sufficiency of the evidence to show mental incapacity?

Respondent stresses the testimony of Dr. Nibling on cross-examination. On direct examination he had testified that on September 20th and 21st, Mr. Williams was "nervous and more or less unstrung". (Tr., pg. 111); that on September 11th, "he was suffering considerably with hiccoughing and pain in his abdomen, and he took a rather heavy dose of morphine to relieve it;" that the patient had some fever and a rather fast pulse; that from September 12 to September 16th, X-ray and laboratory tests were made in the clinic; that they were inconclusive, but they "showed enough pathology for me to believe there was some serious trouble around the gall-bladder or liver" (Tr., pg. 110); that the X-ray showing pus at the roots of the teeth, he recommended that all the patient's teeth be pulled.

It is quite evident that Dr. Nibling was puzzled; and deeply concerned in trying to determine the nature of the malady; an unusually baffling problem confronted him. Is it not a reasonable conclusion that he devoted his attention to the reading of X-rays and inspection of laboratory findings rather than to the patient's mental condition?

All this time the patient was growing worse. The following quotation is from Mrs. Williams' testimony: "We changed to Dr. Marberry about the first of October."

On direct examination, Dr. Nibling, when asked about the probable effects of toxins and infections, as in the case

of Mr. Williams, testified that they "would cause a general upset of the whole mechanism" (Tr., pg. 111).

The following is taken from his direct examination on page 112 of the transcript:

> "Q. Would this absorption affect or react upon the brain or mind in any manner or the nervous system?
>
> "A. Well, in a way I believe it would. I cannot state definitely how, except that a poisonous condition just upsets the mental equilibrium."

On cross-examination he could not recall any topic of conversation with Mr. Williams "other than his ailments—his condition" (Tr., pg. 113).

All these observations go to the weight of Dr. Nibling's adverse testimony on cross-examination; and are made in view of the stress laid thereon by respondent. Respondent characterizes said testimony as "frank and important"—of so much importance that on the strength of it respondent says:

"It is uncontradicted, then, that Williams was in the possession of his mental powers both two days before and also even two days after the signing of the instrument"—respondent's brief in opposition to the petition, page 117.

We respectfully submit that this quoted statement of respondent ignores all else in the record.

Dr. Nibling's testimony on cross-examination simply presents a conflict in the evidence; even conflicting, to some extent, with his own testimony on direct examination. As to the weight thereof, the jury heard him testify, observed his demeanor on the witness stand, and resolved the conflicts against the contentions of respondent.

Petitioner respectfully submits that tested by the rule laid down by this high court and universally recognized, the evidence in this case is of such probative force that respondent's assignment challenging the sufficiency thereof, and assailing the verdict, must fall.

How can it be said of the verdict in this case, under the record here presented, that "all reasonable men exercising an unprejudiced judgment would draw an opposite conclusion from the facts?" *Story Parchment Company* v. *Paterson Paper Parchment Company*, 282 U. S. 555, 51 Sup. Ct. 248 (Quotation is found on page 252, immediately preceding Sec. (7) of 51 Sup. Ct.).

The same test in different words is set forth in the opinion in *Wharton* v. *Aetna Life Ins. Co.*, 48 Fed. (2d) 37 (certiorari denied 52 Sup. Ct. 9), as follows:

> "Where the evidence is of such a character as reasonable men may reach different conclusions, the case should be submitted to the jury."

The following quotation is from the opinion in the case of *Sprencel* v. *U. S.*, 47 Fed. (2d) 501:

> "If the proof as to the material facts was such that reasonable minds might draw different conclusions, one of which would sustain the plaintiff's claim, then the court was not justified in taking the case away from the jury."

The following quotation is from the opinion in the case of *Union Pacific Ry. Co.* v. *Harris*, 158 U. S. 326, 39 L. Ed. 1003, 15 Sup. Ct. 843 (on page 845):

> "The railway company moved that the jury be instructed that, upon the evidence, the release was a complete bar to the action, which instruction the court declined to give, and defendant excepted; but, as there was evidence tending to sustain plaintiff's contention in relation to the validity of the release, the instruction was properly refused."

Again we quote from the opinion in the same case, that is, the case of *Railway Company* v. *Harris, supra* (15 Sup. Ct., pg. 845):

"The court charged the jury in this regard, in substance, as follows: 'A release of this kind is of the highest significance in general when it appears that the situation and circumstances of the parties show that it has been entered into with an understanding of the rights of the parties, respectively, and with intent to include all matters of difference between them'; and 'that when the parties are upon an equal footing, and there seems to be no reason to believe that any mistake has been made in respect to it, that neither party is at liberty to deny the force and effect of what it may contain; he is not at liberty to say that he did not read it or that he did not understand it'; but that when it appears that either party is in a situation as to his health, physical condition, or as to the state of his mind, that makes it probable that he acted without deliberation, without an understanding of the act with which he is charged, the instrument itself may be disregarded'; that in this instance, plaintiff, having been injured July 30th, and while he was lying in bed apparently quite ill, 'was approached by an agent of the defendant company, and was induced to sign the release which has been put in evidence before you,' and upon that 'it becomes a question in the first instance whether he was in a condition to know precisely what he was doing. He seems to have had in some degree and to some extent the possession of his faculties. He had used whiskey at the time of the accident, or shortly afterwards, and morphine had been administered to him on several occasions. There is a question as to the effect of the accident, how far he was disabled by it, and as to the effect of the drug and the whiskey, perhaps, on his mind; *whether he was then in a condition to deal with such a subject as was presented to him. If he was not, and you can say that his faculties were in such a state that he could not comprehend what he was doing, and the force and effect of the paper which he signed, you may say he is not to be charged with it.*" (Italics ours.)

POINT 2.

The purported dividend order dated September 18, 1931, is unavailing to respondent because same was procured by fraud.

The general circumstances surrounding the transaction of September 18, 1931, have already been stated. The circumstance—unexplained in this record—that on that occasion Mr. George T. Lee obtained a note from the insured payable to the order of The Union Central Life Insurance Company is discussed in our brief in support of the petition for the writ (on pages 63-64 and 65, under Point E).

But aside from that circumstance, we respectfully submit that respondent's own evidence, viewed in the light most favorable to respondent, shows, as a matter of law, fraud in the transaction of September 18, 1931.

"It is well settled in this state that material misrepresentations, though innocently made, relied and acted on by the party to whom made, constitute legal fraud." *Poindexter* v. *Davis*, 27 S. W. (2d), 139; quotation is from opinion by Commission of Appeals (in Supreme Court of Texas), page 141, citing a number of decisions by the Supreme Court and Courts of Civil Appeals.

The following portion of the deposition of the witness George T. Lee are deemed pertinent on this point:

Direct examination:

"I told Mr. Williams I had come to ask him to sign an instrument releasing the dividends on these policies to Lee & Lee so that they might be credited on a note that he had given for the premiums on the policies, and to execute a new note for the remainder of the debt. I told him that I was handling the matter for Lee & Lee, that I was an attorney, and not connected with the firm.

"Mr. Williams at first demurred, saying that he was 'peeved' at the company, etc., and did not want to sign

the instrument. We discussed other matters not related to the transaction some 15 or 20 minutes, and finally I persuaded Mr. Williams to sign a written order to the company releasing the dividends to Lee & Lee, and he executed a note for the remainder of his debt to Lee & Lee, for moneys advanced by Lee & Lee for the previous year's premiums. Mr. Williams had given Lee & Lee a note for the debt. (Tr., p. 150.)

"I told Mr. Williams that it was the dividends on the policies mentioned in that written order that I wished him to assign to Lee & Lee. I told him I wanted him to assign the dividends on all the insurance that he had. He seemed to understand thoroughly that it was the dividends on all those policies that he was directing the payment of to Lee & Lee. In the course of the conversation he had said that he was entitled to these dividends, that he didn't feel like giving those dividends to Lee & Lee, although he admitted the indebtedness. That was in the first part of the conversation. Later on, he agreed to assign the dividends, because he did owe Lee & Lee this money on the insurance, which he could not pay. He stated that he could not pay the notes.

"*I told him that the policies had lapsed, according to my information and belief, and that he was merely assigning something that did not belong to him, but was really Lee & Lee's and should properly go to Lee & Lee, inasmuch as they had paid the note which he had given for the premiums* which they had paid to the company themselves; that if he could not pay the premiums, that the least he could do would be to pay Lee & Lee these dividends, which were returnable to him on the lapsed policies, and give a note for the balance; and he finally agreed to it and did do it.

"Mr. Williams' failure to pay the premiums was mentioned *as the cause of the lapsed policies,* also the further fact that he had not paid the premiums for the year before, that is, for two years. He had given a note, and had not paid the note. I refer to the premiums of 1930 and 1931, and the note for the 1930 pre-

miums. It is correct that so far as the company was concerned the 1930 premium had been paid and that Lee & Lee had paid it to the Company, and not Mr. Williams, and Mr. Williams admitted that was true." (Tr., pages 152-153.) (Italics ours.)

Cross-examination:

"Q. You told Mr. Williams that since Lee & Lee had paid that money for the 1930 premiums and since he had failed to pay his 1931 premiums, his policies had lapsed, and that the dividends were payable?

"A. I explained to him that, as a matter of justice, they belonged to Lee & Lee.

"Q. They were payable in cash and were payable to them?

"A. Yes, sir, they ought to be paid to Lee & Lee. I told him they belonged to him unless he was willing to transfer them to Lee & Lee. (Tr., p. 155.)

"After he and Humlong concluded their conversation about the ranch and other things I simply *repeated my former statements,* and he said 'Well, there is nothing to do, I guess, but to sign this thing, but I'm sore about it.' He never did get to where he was delighted to sign it or anything like that. His consent to put his signature to the order was rather reluctantly given; he didn't jump at it.

"Yes, it was when Mr. Williams was having the conversation with me showing his attitude was quite hostile that Mr. Humlong injected himself into the conversation. He wanted to soothe him down; I didn't want him sore; you cannot transact business when a man is hostile to you, and I knew that I could not get what I wanted if he remained in that attitude." (Tr., p. 156.) (Italics ours.)

Recross-examination:

"The first part of the conversation between Mr. Williams and myself, in which he was consistently refusing my request must have been about five or ten minutes. Then Mr. Humlong broke into the conversa-

tion, and he and Mr. Williams discussed other things for about ten or fifteen minutes—about Mr. Williams' beautiful cattle, his good-looking crops, etc. After he and Mr. Humlong finished talking, I then talked to Mr. Williams again about five minutes before he began to indicate any kind of willingness in the matter." (Tr., p. 157.)

Redirect examination:

"Before I left for San Angelo I had the pleadings prepared to file a suit against Mr. Williams on the note for $1,643.63 and to run a garnishment against The Union Central Life Insurance Company. I may have told Mr. Williams during the conversation that in the event the instrument was not signed, there was no other alternative; I think perhaps I did tell him that."

Recross-examination:

"At the time Mr. Williams signed the instruments that I have identified he was fairly friendly; I don't think that he was happy over the situation." (Tr., p. 158.)

Thus it conclusively appears that George T. Lee, the attorney, stated and represented to the insured that all the insurance was at an end; that the only thing left was a sum of money accruing by virtue of dividends. True he did not use these *exact* words; but that he conveyed that idea and impression to the insured, and that the insured acted thereupon, are inescapable conclusions. Viewing the whole transaction in the light most favorable to respondent; and if the insured had any comprehension at all thereof.)

As we interpret its contentions, respondent takes the position that insured did have that understanding; contending that all insurance had terminated long prior to said

date; and that there was left for consideration on September 18, 1931, only a sum in cash arising from dividends; that the transaction related only to a disposition of this money.

We further understand respondent's position to be that if it be held that there was insurance in force on September 18, 1931, then respondent invokes said dividend order as a release or settlement extinguishing such insurance.

It clearly appears from the above quoted testimony of Mr. George T. Lee as well as from other portions of the record that P. H. Williams never—at any time—intended to relinquish or surrender insurance. He had refused to sign surrender forms (Tr., p. 97).

The general agents, Lee & Lee, in their letter to the home office under date of September 19, 1931, stated: "Our attorney has just returned from West Texas, where he went either to get a settlement with Mr. Williams or file suit against him with an ancillary proceeding against the company for the dividends. After Mr. Williams had found that we were desperately in earnest about suing him for $1,643.63 *and fastening these dividends so he couldn't get them*, he signed an order on the company directing that all of these dividends be paid to Lee & Lee" (Tr., p. 98). (Italics ours.)

Mr. George T. Lee, the attorney, used the term "lapsed" in talking to Mr. Williams. He was not talking to an insurance actuary or expert, and used that term in its ordinary sense—of slipping away (into oblivion, or out of existence); of becoming void or forfeited—extinguished.

Even by insurance companies and their agents the term is so used; as well as in its strictly actuarial sense—so much so as to lead to no little confusion.

When Mr. Lee said that his "information" was that the policy had lapsed, he was clearly referring to Lee & Lee, the general agents, as the source of that information—they

acting for the company in thus communicating to a policyholder information as to the status of policies taken out by him—policies which the company then held in its possession, and had so held since June, 1930; which Mr. Williams had not seen since that date. Mr. Pattison, respondent's assistant secretary, testified—by deposition—that the policies had, throughout said period of more than a year, and up until the time of the trial, been in the home office, at Cincinnati, Ohio (Tr., p. 84).

This was equivalent to an outright declaration that all the insurance had come to an end; had been extinguished.

These representations, even if made innocently and in all sincerity, were not true; through them, Mr. Lee, to use his own words, "finally persuaded" the insured to sign the instrument in question.

Incidentally, he testified that the money borrowed from Lee & Lee had paid *all* the 1930 premiums. That this was not true, and that in fact said money paid only a *part* thereof, and the insured paid the balance, is disclosed in the letter from the general agents to the home office (Tr., 96-97).

Again, similar confusion on this question is found in the statement in respondent's brief in opposition to the petition, under the heading "Facts With Reference to Lapse of Policy and Actual Payment of Dividend"—page 54.

> "The policyholder had paid each premium prior to that of June 10, 1931, and in so doing had applied the annual dividend as part payment (Tr., p. 159); but the policyholder had exhausted his borrowing power under his insurance in June, 1930, and, in addition, indulging the hope of improved financial condition within the ensuing twelve months, had borrowed from Lee & Lee $1,643.63 with which to maintain his insurance. But he had been unable to repay this sum even in part, and was wholly unable to settle in any way the premium of June 10, 1931."

The record discloses that respondent had issued to P. H. Williams six policies (Tr. 98). One of these—number 989355—had been assigned prior to September 18, 1931. The 1931 dividend of $184.75 on the assigned policy is not included in the purported "dividend order" (Tr. 151).

While this record does not disclose exactly how the matter was handled, it appears that the general agents obtained the amount of the 1931 dividend on the assigned policy also. The amount thereof added to the sum of $667.35 (the total of the 1931 dividends on the other five policies), gives an aggregate amount of $852.10, which the general agents obtained.

The particular policy introduced in evidence in this suit is number 940457. The 1931 dividend on same amounted to $74.80. The aggregate amount of all the 1931 dividends on all the policies was more than eleven times the amount of the 1931 dividend on said policy 940457. The annual premium on said policy 940457 was $449.10.

It is a well known fact that the larger the premium, the larger the dividend—*Atlantic Life Insurance Co.* v. *Pharr*, 59 Fed. (2d) 1024; *U. S. Life Ins. Co.* v. *Spinks*, 13 L. R. A. (N. S.) 1053, 126 Ky. 405, 96 S. W. 889. In fact, there is a definite fixed ratio between premiums and dividends; and the dividend formula used by respondent takes into account that ratio (testimony of Mr. Koeppe, respondent's assistant actuary—on cross examination). (Tr., 169-170.)

Bearing this in mind, a simple calculation demonstrates that that $1,643.63, which Mr. Williams borrowed from the general agents, was less than one-third of the aggregate amount of all the 1930 premiums.

These remarks are made in view of the fact that statements appear not only in the testimony of Mr. Lee but in respondent's brief, from which it might be inferred that the money borrowed from Lee & Lee paid all the 1930

premiums on all the policies. From this we do not mean to imply any criticism of respondent's counsel, as such statements are on their part inadvertent.

Mr. Lee, the attorney, testified that in the conversation with the insured on September 18, "Mr. Williams' failure to pay the premiums was mentioned as the cause of the lapsed policies, *also the further fact that he had not paid the premiums for the year before, that is, for two years*" (Tr. 152). (Italics ours.)

Of course, default in the payment of the note to Lee & Lee—a personal obligation of the insured to them—could not, in any way, affect the status of the insurance.

It is difficult to conceive how an attorney-at-law could understand otherwise; or how he could consider such a circumstance as at all pertinent in speaking of "the cause of the lapsed policies."

Do the samewhat vague remarks of the witness, following the above quotation, qualify his said statement as to what was "mentioned" as "the cause of the lapsed policies"?

We respectfully submit they do not; except to the extent that he was referring to the 1931 premium and to the note executed by the insured to Lee & Lee in 1930. Our contention is that he represented to the insured, in substance, that default in the payment of the note to Lee & Lee constituted a cause "of the lapsed policies."

The testimony referred to has been copied in full hereinabove in connection with those portions of the deposition of George T. Lee deemed material hereunder; and we refer thereto and to the record (beginning with the last sentence on page 152 and concluding on page 153) for the testimony characterized above as "vague remarks."

On redirect examination by counsel for respondent, Mr. Lee testified, in respondent's behalf:

> "Q. Did you make any statement to Mr. Williams as to whether or not you had any connection with

The Union Central Life Insurance Company, and if so, what the connection was?

A. I told him that I was not connected with the insurance end of The Union Central Life Insurance Company, did not represent them; that I was not their attorney, and that in this particular instance I was a lawyer in Dallas representing Lee & Lee, the general agents for the company; that I had no authority to bind The Union Central Life Insurance Company to any action whatever; that my only purpose was to secure a release of those dividends to Lee & Lee." (T. 156-157).

Although he so testified, this record shows that on that occasion he did obtain a note signed by P. H. Williams and payable to the order of The Union Central Life Insurance Company (Tr. 99). This action on his part respondent did not repudiate.

But aside from that, can respondent invoke the purported "dividend order" freed from representations made to obtain it?

Before the attorney made the trip from Dallas to San Angelo and the Williams farm, the home office was advised of the course of conduct being pursued by its general agents (Tr. 96-7).

And the home office likewise had information from its general agents—as well as notice otherwise—as to the constant desire of the insured to hold on to his insurance (Tr. 97).

Immediately after the transaction of September 18, the general agents wrote to the home office a letter (dated September 19, 1931), setting forth what had been accomplished by the attorney, and advising, in substance and effect, that the transaction had been handled as one *relating to the disposition of money* (Tr. 98-99).

And enclosed with that letter were a note signed by P. H. Williams, payable to the order of The Union Central Life

Insurance Company; and a "dividend order" referring to dividends "on policies now lapsed."

That the insured had consistently refused to sign surrender forms; that he wanted *insurance*, not *cash*, for the dividends—these facts were well known to the home office before any action whatsoever was taken concerning said "dividend order."

Mr. Pattison, respondent's assistant secretary, testified that the check to Lee was issued September 28, 1931 (Tr. 160). Why it was not issued sooner does not appear.

We submit that any reasonably prudent person, situated as was respondent, and with the information it had as to the desire of P. H. Williams to hold on to his insurance, would have contemplated and realized that in the transaction of September 18 the said attorney had discussed the status of the policy or policies, and had led Mr. Williams to believe that all insurance was at an end; and had thereby procured his signature to the "dividend order." (Without taking into account the note to The Union Central Life Insurance Company; and viewing the case in the light most favorable to respondent.)

Under these circumstances, the situation presented is the same as if the general agents themselves and in person had conducted the transaction of September 18.

In Texas, as elsewhere, general agents are, in effect, in general dealings with policy-holders, the *alter ego* of the company. *Commonwealth Casualty Company* v. *Coogle*, 31 S. W. (2d) 362.

The responsibility of the principal is not affected by the fact that the general agents primarily had a purpose of their own to serve. *Gleason* v. *Seaboard Co.*, 278 U. S. 349, 49 S. Ct. 161, 73 L. Ed. 415.

It was certainly within the scope of employment of the general agents to give information to him as to the status of his insurance; this authority was, with the knowledge

and acquiescence of respondent, delegated to the attorney, Mr. Lee, who, thereupon for that purpose, became the agent of respondent. The following quotation is from Vol. 2, Corpus Juris, p. 849:

> "Acts of fraud by the agent, committed in the course or scope of his employment, are also binding on the principal, even though the principal did not in fact know of or authorize the commission of the fraudulent acts, and although he derives no benefit from the success of the fraud."

But if Mr. Lee, the attorney, had entered into the transaction of September 18, without any authority whatsoever, respondent nevertheless, in this case, would be responsible for what he did and said there, under the doctrine of adoption.

Invoking the transaction of September 18, respondent must take same with all its burdens.

The following quotations are from the opinion in the case of *Henderson* v. *San Antonio M. G. Ry. Co.*, 17 Tex. 560, 67 Am. Dec. 675 (one of the leading cases cited to this day by the Texas Supreme Court, as announcing the applicable rule) (the opinion was written by Wheeler, Justice; the quotations are from the Tex. (Sup.) Report, pages 575-577).

> "And even though the agent has transcended his authority in making the contract, yet if the principal ratify it, and make the contract his own by availing himself of the benefit of it, he is liable in like manner as if he had personally made the contract. And if the agent has made misrepresentations, the principal is bound by them, for he cannot ratify the contract and avoid the responsibility of the representations, etc., which formed its basis; but he must avoid or ratify the contract *in toto* (Story on Con., sec. 496). This doctrine was affirmed by Judge Story in *Hough* v. *Richardson* (3 Story, 689), and I quote the language of the

learned judge as asserting a principle applicable to the facts of the present case: 'The sale, then, being made by Moulton, not as himself the owner—which he was not—but as the agent of the owners, it follows that they are bound by his representations, made at the time, touching the sale, as a part of the *res gestæ;* and as to the purchasers, it makes no difference whether these representations were made by the authority of the owners or not, if they were material to and constituted the basis of the sale, and it was made by the purchaser on the faith and credit of these representations. Under such circumstances the sale is good in the entirety, or not good at all. The owners have no right to insist upon the validity of the sale independent of the representations. *The whole must be taken together as a part of one and the same transaction. It cannot be adopted in part and rejected in part. It must be taken as good for the whole or not at all.*' (And see 1 Story 172; 3 id. 612, 729.)

The trial court therefore erred in charging the jury that, in order to set aside the contract on the ground of the fraudulent representations of the agent, they must have been made with the knowledge and by authority of the company. The representations of the agent, acting within the scope of his authority and employment, are treated as the representations of the principal himself, and are binding upon him, whether he knew of them or not. And, as we have just seen, though he exceeded his authority in making the contract, yet, as the company, by accepting a conveyance from the trustee and taking the benefit of the contract, have ratified and *adopted his acts and made them their own,* they are liable in like manner as if they had personally done the acts. *They must take them all together, and with all their consequences.*

Then, as to the proposition embraced in the charge, that, to avoid the contract, the false representations must have been made 'with the intent to deceive and defraud the plaintiff,' the court was equally in error. 'If a material misrepresentation be made, although it

be not embodied in the contract, *it is considered as a constructive or legal fraud, although it be made without any willful intention to deceive, but merely through carelessness, mistake or ignorance'* '' (Italics ours).

The following quotation is from the opinion in the case of *Buchanan* v. *Burnett,* 102 Tex. 492, 119 S. W. 1141, 132 Am. St. Rep. 900:

"It is urged by the plaintiff in error that the evidence in this case shows only that the plaintiff in error expressed his opinion of the reliability of his title, and therefore it constituted no cause for rescission of the sale. Although the statement made by Buchanan to Burnett embodied a conclusion drawn from the facts relative to the title, it was in effect a representation that the facts which would constitute a good title to the land existed. It was not an opinion as to the legal effect of known facts and muniments of title for which the seller would not be responsible. The ignorance of Burnett on the subject of land titles adds force to the conclusion that the representations made by Buchanan had the effect of a statement that all the facts existed which would constitute a good title to the land.

The plaintiff in error requested the trial court to give to the jury a charge to the effect that, in order for Burnett to avail himself of the misrepresentations of title, he must not only have been ignorant of the existence of the defect, but must have relied 'solely' upon that representation in making the purchase. The trial court refused to give the requested charge, and the Court of Civil Appeals correctly held that it was sufficient if Burnett relied upon the false representations made by Buchanan and would not have made the purchase if the representations had not been made. There is no error in this holding.

The fact that Buchanan believed that he had a good title to the land when he sold it and when he made the deed to Burnett was unimportant, if in fact Burnett believed the representations to be true and relied upon

them, making the purchase upon the faith of the statements made by Buchanan'' (119 S. W. 1142).

The record discloses that on November 12, 1931, respondent wrote to petitioner's attorney, advising that the policy ''lapsed without value for failure to pay the premium due June 10, 1931. At time of lapse the outstanding indebtedness by way of policy advance and interest exhausted all equity. Since there is no liability on the part of this company, proof of death will not be required'' (Tr. 100).

It will be noted that no mention was made of the ''dividend order.''

Respondent invoked the ''dividend order'' by a First Amended Original Answer, filed October 20, 1932 (Tr. 35).

In her First Supplemental Petition, filed on the same date—October 20, 1932—petitioner alleged that tender of the amount of the 1931 dividend, with ten per cent interest, had been made; and had been refused; and that she tendered same into court (Tr. 54; Section IX, alleging tender, on p. 66).

In invoking the ''dividend order'' in its said First Amended Original Answer, filed October 20, 1932, respondent did so in the following language:

> ''But it (defendant) subsequently received from the said Williams a written instrument, dated September 18, 1931, made and executed by the said Williams, directing the payment of the dividend of $74.80 to Lee & Lee of Dallas, Texas, and in compliance with and in reliance on said order the defendant paid the said sum to the said Lee & Lee, and such payment to the said Lee & Lee, being a payment to the said Williams' order, constituted a payment in cash to the said Williams of the said dividend'' (Sub. 11 of said pleading, Tr. 52-53).

A stipulation as to tender appears on page 82 of the record.

The same situation as to tender exists with reference to all amounts mentioned in said dividend order.

We take it that respondent now makes no contention relative to this matter.

We respectfully submit that, without reference to the plea of mental incapacity, and viewing the evidence in the light most favorable to respondent, the transaction of September 18, 1931, affords to respondent no protection; being nullified, as a matter of law, by fraud.

POINT 3.

Even under respondent's contentions, and under respondent's own evidence, the purported dividend order was signed by the insured under a mistake as to his rights; said mistake being induced by acts and representations of respondent and its agents.

The foregoing discussion is generally applicable hereunder.

That is, viewing the transaction of September 18 in the light most favorable to respondent, and without reference to the plea of mental incapacity, the evidence conclusively shows that (if the insured had any understanding at all of same, and if same be considered as involving the subject matter of insurance) he was mistaken as to his rights in such subject matter—such mistake being induced by acts and representations of respondent and its agents and representatives.

Without repeating the evidence or discussion, we submit that it clearly appears that the insured did not realize or understand his then existing rights relating to insurance.

The applicable rule is stated in Ruling Case Law, Vol. 23, page 388, as follows:

> "While ignorance of general law does not excuse, ignorance of one's personal, private right, under the law, arising out of existing facts, does excuse."

In the case of *Wheeler* v. *Smith,* 13 L. Ed. 44, 9 Howard 55, 50 U. S. 53, this situation was presented: Wheeler had signed a compromise agreement and a release relating to a will under a mistaken belief as to his rights under the will. The following quotation is from the concluding portion of the opinion in that case (pp. 80-81 of U. S. Report):

> "But in making the compromise, the parties did not stand on equal ground. * * * And it appears to us that the agreement, under the circumstances, is void. It cannot be sustained on principles which lie at the foundation of a valid contract. The influence operating upon the mind of the complainant induced him to sacrifice his interests. *He did not act freely and with a proper understanding of his rights.*" (Italics ours.)

Conclusion.

With reference to respondent's criticisms of the court's charge, we submit that when the charge is considered as a whole, the objections thereto fall.

With reference to the contention relating to the constitutionality of Article 4736, Revised Civil Statutes of Texas (the penalty statute), we submit that is a matter long since settled by a uniform line of decisions, both by the Supreme Court of the United States and by the appellate courts of Texas (cited in respondent's brief).

In view of the fact that prior to the commencement of this litigation respondent predicated its claim of nonliability on the contention that "the policy lapsed without value for failure to pay the premium due June 10, 1931"; and that "at the time of lapse, the outstanding indebtedness, by way of policy advance and interest, exhausted all

equity" (Tr., p. 100)—in view of that, is the position which respondent takes in this case with reference to the transaction of September 18 tenable?

The following quotation is from the opinion in the case of *Ohio & M. Ry. Co.* v. *McCarthy*, 96 U. S. 258, 24 L. Ed. 659 (concluding paragraph of opinion):

> "Where a party gives a reason for his conduct and decision touching anything involved in the controversy, he cannot, after litigation is begun, change his ground and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is stopped from doing it by a settled principle of law."

An examination of the judgment and the verdict discloses that the amount of recovery was arrived at through the following calculations:

Face amount of policy minus the loan equals	$9,101.12
10 per cent attorneys' fees, as per stipulation of the parties, equals	910.00
12 per cent penalty on the sum of $9,101.12 equals	1,092.13
Interest allowed equals	409.50
Total (amount of judgment) equals	$11,512.75

The amount of the interest allowed, $409.50, is 6 per cent interest on the sum of $9,101.12 for a period of nine (9) months—from January 1, 1932, to October 1, 1932. Hence, it is evident that there was not taken into consideration any interest for the last half of the month of October, 1931, the months of November and December, 1931, and the month of October, 1932, prior to the date of the judgment, October 24. Thus it appears that interest for periods aggregating more than three months is not charged against respondent;

said interest not charged far exceeding the amount of the 1931 dividend of $74.80. Thus respondent, in the recovery herein, has already, in effect, been allowed credit for said dividend.

WHEREFORE, petitioner prays that the judgment herein of the Circuit Court of Appeals be reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 208.

NANNIE MAY WILLIAMS,
Petitioner,

v.

THE UNION CENTRAL LIFE INSURANCE COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES.

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No. 208.

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THE UNION CENTRAL LIFE INSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petitioner's summary statement fails sufficiently to disclose:

(1) That this was a suit on a lapsed four-year-old ordinary life annual dividend policy on which the policyholder had used all previously declared annual dividends, and had withdrawn all but $11.12 of the surrender value, and that such $11.12, applied pursuant to a policy provision to purchase term insurance, was insufficient to cover

even the thirty-one days of grace during which, under the grace provision, the policy remained in force; that the insured, though duly notified of premium maturity, allowed the policy to lapse, and specified no different disposition than that which was automatic under a policy provision for the dividend of $74.80 allowable to the policyholder on the premium maturity; that the automatic disposition so stipulated for such dividend was that it should be paid in cash to the policyholder; that after the policy lapse and information thereof to the policyholder, the policyholder executed an order on the company to pay the amount of such dividend in cash to third parties, his creditors; that the company thereupon paid such amount in cash to such creditors on such order; that thereafter the company formally notified the policyholder of the termination of all his rights under the policy, and that thereafter the policyholder died.

(2) That the petitioner's asserted claim, for purpose of recovery herein, is that the former policyholder was non compos mentis when he executed the order for the payment of the dividend—though for other purposes and to his family and physician apparently wholly compos mentis, and that hence, arguendo, despite the company's utmost good faith, the payment of the dividend was ineffectual to discharge the company's obligation to the former policyholder for its amount.

(3) That, further, the petitioner's asserted claim, for purpose of recovery herein, is that, despite the fact that

the policy provision (Tr., p. 85, Art. 11) dealing wholly, completely and specifically with reference to the dividend stipulated for an optional use of the dividend, by election within the thirty-one days of grace, in either (a) payment in cash to the policyholder, (b) application in payment of premium, (c) left to accumulate at 3 per cent interest, with the company if the policy be continued, or (d) applied to the purchase of a paid-up addition to the policy, **and not in any event to the purchase of term insurance**, and despite the further fact that such policy provision (Tr., p. 85, Art. 12) stipulated that, in default of election, the automatic disposition of the dividend should be payment in cash to the policyholder, yet, even in the circumstance of actual payment by the company of the dividend in cash on the order of the policyholder prior to his death, his beneficiary should be entitled after his death to have substituted for such prior cash payment "term insurance" for the full amount of the policy—it having developed after his death that, had he possessed a right to use the amount of the dividend for the purchase of term insurance, and had he done so, the amount would have been sufficient to cover the date of his death.

(4) That, in support of such claim, the petitioner presents heterogeneous contentions as follows:

(a) Dividends (notwithstanding the specific policy provision for the disposition of dividends as such) are a part of the reserve or net value or surrender value of a policy, and, under a provision relating to

such item, may be applied to the purchase of term insurance, or

(b) If dividends are not a part of the reserve or net value or surrender value of a policy, they are "paid-up additions" or "dividend additions" to a policy, and under a provision of the policy relating to the reserve or net value or surrender value of "paid-up additions" or "dividend additions" may be converted into term insurance, or

(c) If dividends are not a part of the reserve or net value or surrender value of a policy, and are not "dividend additions" or "paid-up additions" to the policy, and if such dividends, in the situation which existed in this case, were payable in cash to the policy-holder, the policyholder is entitled, on general principles, and without any permitting stipulation in the contract, and without election or notice to the company, that the company should substitute term insurance for the amounts agreed to be paid in cash, and that, in any event, if his death establish the preferability of such term insurance to cash, his beneficiary is entitled that, after his death, term insurance be substituted for the cash claimed by, and paid to, the policyholder, or on his order, in his lifetime.

(5) That the instrument (Tr., p. 91) called by the petitioner a "policy loan note," for the $898.88 already withdrawn by the policyholder, was not in fact a note or personal obligation of the policyholder, but a mere evidence of lien on, or of deduction or anticipation of, future benefits under the policy, on account of such withdrawal of $898.88.

(6) That the paper of July 15, 1931, referred to (pp. 10-11, 16) was merely a statement or tabulation prepared by the company at the request of Lee & Lee, as a basis for negotiations with the policyholder for restoration or continuance of some part of his insurance, after the policy in suit already had terminated; that such paper does not appear from the evidence ever to have been exhibited to the policyholder, and that such paper was, as the Circuit Court of Appeals accurately declared, "a suggestion of what could be done, not a declaration of what had been done" (contrary to the statement of petitioner with reference to it on page 16 of his petition). Obviously, such paper can have no effect upon the rights of the parties, and it has no pertinency to the issue involved.

PETITIONER'S ASSIGNED REASONS FOR ALLOWANCE OF WRIT.

The petitioner assigns as reasons for the allowance of the writ, principally, the supposed conflict of the decision of the Circuit Court of Appeals in this case with several other decisions.

The issues involved in the specified cases were variant from those in the case at bar. The conflict claimed is not real and substantial, but apparent or superficial only, and arises from casual or loose language or expressions, unimportant to the issues involved and decisions actually made. The decision of the Circuit Court of Appeals in the case at bar is in no proper sense a conflict with any of such deci-

sions, but, on the contrary, is in accord with the elementary principles of law applicable to insurance. It manifests a clear understanding of the terminology of insurance; it employs insurance terms with precision just as they are employed in the policy in suit, and in the statute to which the petitioner refers.

A review of the cases specified by the petitioner will disclose the absence of any real conflict with the same on the part of the decision of the Circuit Court of Appeals.

In the case of *Atlantic Life Ins. Co. v. Pharr*, 59 Fed (2d) 1024, the claim and practice of the insurer was that the current dividend of $115.20 was subject to the use of the insured only in the event the current premium was paid, and that if such premium was not paid the dividend was retainable by the insurer as its own property. The Court rejected this claim, both from a consideration of the dividend clauses of the policy and from the consideration that the insurer was a mutual company. Since the Court held that a sum was available for the benefit of the policyholder, for a definite or specific use of which the policy made no provision, the Court interpreted a rather general and obscure term in the policy, to wit, "the balance of value" (which under a policy provision would be applied to the purchase of extended term insurance), as sufficient to include this additional value of $115.20 which the Court held was available, but which the company had unjustifiably attempted to claim and retain as its property. The term "balance of value" appeared in a clause as follows:

"If the available cash value be insufficient to pay an annual premium and interest as above stated, the company will continue the contract as extended insurance for such time as the **balance of value** will permit."

The decision in the case of *Harvey v. Union Central Life Ins. Co.*, 45 Fed. (2d) 78, is by a divided court.

It involved the respondent's form of contract under an earlier edition, but the issue decided was not involved in the case at bar.

The decision was placed squarely on the ground that, in the circumstances of that case, the extended insurance ran, not from the valuation date fixed in the policy, but from the time of delivery of the policy, and that, inasmuch as the term did not begin to run until the anniversary date after delivery, the extended insurance was in force at the death of the insured without reference to, and without taking into account, any dividend in figuring the period of extended insurance. That such was the decision of the Court appears from the following excerpt from the Court's opinion:

"This shows conclusively that the mere fact of paying an annual premium in advance will not operate to penalize the insured by shortening the term of insurance to less than one year from the agreed date upon which the policy becomes effective and from which the policy year begins to run. The Court was in error in sustaining the contrary view and **must be reversed.**

"In view of this ruling a determination of the other issues becomes somewhat unnecessary and they will be discussed but briefly."

Having thus decided to reverse the judgment below, the Court, in taking up such other issues for casual discussion, intimated also, without deciding and without any careful consideration, and without resting the case on such point, that the dividend could have been used to increase further the term of extension, and it added that "the company held two policy lien **notes**, and even if the dividend should have been paid in cash, it was a creditor in possession with the right to apply the money to the reduction of the loan. • • •"

According to the opinion, there was an actual indebtedness evidenced by "notes," and the Court was not speaking of a policy loan agreement such as we have in the case at bar. If it did have such a lien in mind, the statement of the Court that "it was a creditor in possession with the right to apply the money to the reduction of the loan" is clearly erroneous, being contrary in principle to the doctrine of *Orleans Parish v. New York Life Ins. Co.*, 216 U. S. 517 (as pointed out by the Circuit Court of Appeals (Op., Tr., p. 227).

In the case of *Great Southern Life Ins. Co. v. Jones*, 35 Fed. (2d) 122, a 20-pay policy made no provision for dividends, but had attached to it nineteen so-called premium reduction coupons, one maturing annually in turn so long as the premiums should be paid. Each coupon

contained a promise by the company that it would pay the amount stated therein in any one of several optional settlements. Such options were similar to usual dividend options. Eleven annual premiums were paid, but the twelfth premium was not paid. The Court found that "the premium reduction coupons on December 24, 1921 [12th anniversary of the policy], had a then guaranteed cash value of $425.50 due the insured at the time of his death."

The Court confused "coupons," the payment of which was guaranteed, and which constitute, therefore, a fixed liability of the company, to meet which some fund must be provided, with "dividends," which are declared and are distributable only out of surplus accruing "when by reason of good management, good risk, or the like, the insurer's business shows results above death losses, expenses and reserves" (Op., Tr., p. 224). Then the Court proceeds to confuse "dividends" with "dividend additions." An Oklahoma statute required that each policy issued should provide for a stipulated form of insurance, the net value of which should be at least equal to the reserve at the date of default on the policy and all dividend additions thereto, if any, less any existing indebtedness to the company. The Court, guilty of errors of expression due to a lack of familiarity with the principles and terminology of the insurance business, could have reached the same result had it known that a reserve, according to the assumed mortality table and rate of interest, was kept, and was required to be kept, under funda-

mental principles of insurance, to meet not only the face amount of the insurance as a death benefit, but also to meet each maturing coupon attached to the policy.

First Texas State Ins. Co. v. Smalley, 111 Tex. 68, and *Occidental Life Ins. Co. v. Jamora*, T. C. A. 44 S. W. (2d) 808 are cited as interpreting the term "dividend additions" in a Texas statute as meaning "dividends." But in neither case did the policy involved make provision for the dividends, and in neither case was the Court attempting to arrive at the meaning of the term "dividend additions."

The Jamora case and *Amicable Life Ins. Co. v. White*, T. C. A., 38 S. W. (2d) 860, are cited as "probably" in conflict with the holding by the Circuit Court of Appeals in the case at bar that a withdrawal of the cash value or an advance on "the sole security of the policy" constitutes, not a personal obligation of the policyholder, but a mere evidence of lien on, or of deduction or anticipation of, future benefits under the policy. No such issue was involved in the two cases cited, and there was not even dictum to the contrary.

ADDITIONAL FACTS AND DISCUSSION.

For additional statement of facts and discussion of the provisions of the contract, the terms of a statute referred to by the petitioner, and the well-understood principles of life insurance, meaning of insurance terms, and

computation of insurance reserves and net values, the respondent includes herein, for the convenience of the Court, as an appendix to this brief, its brief filed in the Circuit Court of Appeals.

Respectfully submitted,

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Dated August 2, 1933.

No. 6871.

In The United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT.

THE UNION CENTRAL LIFE INSURANCE COMPANY,
Appellant,

versus

NANNIE MAY WILLIAMS,
Appellee.

BRIEF FOR APPELLANT.

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No. 6871.

In The United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT.

THE UNION CENTRAL LIFE INSURANCE COMPANY,
Appellant,

versus

NANNIE MAY WILLIAMS,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This suit was brought by Nannie May Williams to recover from The Union Central Life Insurance Company on a lapsed insurance policy of $10,000.00 on the life of Peter Hardy Williams, her deceased husband. The policy was of the ordinary life type, issued July 26, 1927, but at an age rate as if issued June 10, 1927, and requiring payment of a premium of $449.10 annually. When the June 10, 1930, premium matured, the insured borrowed $848.00 from the company against the policy, and borrowed $1,643.63 additionally from Lee & Lee, agents of the company, with which to continue in force for another year this and other insurance. But when the premium of June 10, 1931, fell

due the policy lapsed. The indebtedness against the policy amounted, with interest, at that time, to $898.88, which lacked only $11.12 of absorbing the entire cash surrender value, $910.00, of the policy, and the $11.12—applied to the purchase of extended insurance—was insufficient even to cover the cost of the thirty-one days of grace granted for the payment of the premium. A cash dividend of $74.80 was, on the former policyholder's written order, executed September 18, 1931, paid by the company by check on September 28, 1931, to Lee & Lee who had accepted such order as payment pro tanto on the note in their favor for the personal loan of $1,643.63, and thereupon had taken the former policyholder's renewal note for the balance. Death of the former policyholder occurred on October 15, 1931.

This suit is brought upon the theory (1) that the former policyholder was non compos mentis when he executed the order of September 18, 1931, that, for such reason, the payment of such dividend by the company in accordance with such order was ineffectual to discharge the company's obligation to the former policyholder, and (2) that under a contended-for construction of one or another policy provision, molded to conform to a contended-for construction of a Texas statute, the allegedly undischarged liability to the former policyholder for the cash dividend should have been liquidated by the company by substituting therefor "term insurance" in favor of the former policyholder's beneficiary for a brief period, which, as it happened, would include the date of death of the former policyholder.

The Court, with misgivings, refused the defendant's request for a peremptory instruction, submitted the case to the jury; the jury returned a verdict in favor of the plaintiff; judgment was entered pursuant to the verdict; mo-

tion for new trial was overruled, and the defendant, having duly excepted to the charge of the Court, and to the Court's refusal of a request for peremptory instruction, has brought the case to this Court for review.

The presented questions of liability relate to the admissibility and asserted probative force of the pretended evidence of mental incompetency and to the propriety of the contended-for constructions of statute and policy provisions.

SPECIFICATIONS OF ERROR.

1. The Court erred in refusing to give to the jury the defendant's specially requested charge directing a verdict for the defendant, which charge reads as follows:

> "Under the competent and admissible evidence offered in this cause, the plaintiff is not entitled to recover on the policy in suit, in its original form or in any other form of insurance upon the life of Peter Hardy Williams, and you will now return a verdict for the defendant,"

for that the undisputed evidence showed that the policy sued on was not in force at the date of the death of the insured Peter Hardy Williams, either in its original form or in any other form of insurance on the life of the said Peter Hardy Williams. (First Assignment of Error, as amended, Tr., p. 212.)

2. The Court erred in admitting the evidence on behalf of the plaintiff as follows:

Question of the plaintiff's attorney propounded to the plaintiff's witness Dr. F. S. White:

> "Now, doctor, please answer the question that I am about to propound to you, basing your answer thereto upon the following assumed state of facts: For several years prior to the year 1931, P. H. Williams was engaged upon a large scale in the oil business, including the drilling of wells. He was active and energetic; he was, generally speaking, of a sociable disposition and even temperament. Prior to the year 1931 he suffered heavy financial losses, and became despondent, and on at least one occasion he became so morose as to talk of suicide. In the spring and early summer of 1931 there was noticeable to some of those coming in contact with him some lapse

or loss of memory, relating to recent events. During that portion of the year 1931, prior to August 16, 1931, which is the date of the accident that will be hereinafter mentioned, he managed his farm in Irion County, Texas. He at times did work as driving a tractor, handling cattle and general work about the farm. Prior to August 16, 1931, he gave some signs of occasional indisposition, apparent to his wife, but was able to and did work involving physical labor occasionally, as hereinabove indicated. On or about August 16, 1931, while branding a bull yearling, he was kicked in the abdomen by that yearling with such force as to knock him down. Thereafter he did not do any work on the farm involving any material or appreciable physical exertion. He did give directions to the farm hands as to the work, but he was not able to bear in his memory from one day to another the directions so given, this being noticeable on a number of occasions; after the said accident he complained of discomfort, and at times pain in the abdomen. When walking he stooped, and at times was observed holding his hands to his abdomen and side. He became short of breath; at any appreciable exertion he would gasp for breath. Hiccups and headaches developed shortly after the accident and continued intermittently until the time of his death. The hiccups continued to a few days before his death, when he suffered a hemorrhage, after which hemorrhage he did not have hiccups. Both shortly prior to the accident and after the accident he was observed on several occasions sitting in his car, stooped and bowed over the steering wheel, with his head downcast, being and remaining in such position for periods of from thirty to forty-five minutes, manifesting on said occasions no interest whatsoever in his surroundings. In the latter part of August and early part of September, 1931, he went through clinical examinations, including laboratory urinalysis and X-rays, at the San Angelo medical and surgical clinics. Abnormali-

ties were evidenced, by casts, and some sugar was observed in the urinalysis, but not so as to definitely indicate the cause of his trouble. No positive or definite diagnosis was made by the physicians at the clinic, but the X-rays and other findings suggested to the examining physicians and indicated to them that he had a serious disorder, involving the liver and perhaps the gall bladder—in their opinion either a condition of malignancy or cirrhosis. No condition of ascites or dropsy was noted during the period of said examinations, which extended until about the middle of September, 1931. X-rays made of the teeth during said examination disclosed pus pockets in several teeth, and on September 17, 1931, in the morning of said day all of his teeth, some fourteen in number, were extracted. A local anesthetic, with the dental blocking technique, was used. The operating dentist noticed that several teeth had pus pockets at the roots, and further noted a condition of ankylosis in bone tissue, and a deterioration of bone tissue. In the afternoon of said day of September 17, 1931, the said P. H. Williams went from San Angelo, where the dental operation had been performed, to his ranch or farm in Irion County, Texas, a distance of some twenty miles, being taken there in a car. Upon his arrival there he went to bed and spent a restless and practically sleepless night, his gums bleeding all during the night, and practically throughout the night, his condition of restlessness being such that his groaning was noticeable to a farm hand sleeping in the next room to the room adjoining the one in which Mr. Williams was sleeping—noticeable at times during the night. On the morning of September 18, 1931, the said P. H. Williams did not eat any breakfast. He appeared to be to those at the place, and so stated to them, weak and sick. His gums continued to bleed intermittently during the early morning of said date of September 18th. During the preceding night he had had fever. He had some fever during the early

morning of September 18th. He had fever in the afternoon of September 18th a little higher than it had been early in the morning, the fever in the morning being two degrees, or thereabouts, above normal, and in the afternoon being something like two degrees above that in the morning. He did not eat any dinner. He was in bed most of the early part of the morning of September 18th, and sat up during part of the morning of September 18th in a chair in the room joining the bedroom. In the afternoon of September 18th he grew weaker. He had been given aspirin while at his house to relieve his suffering and discomfort. In the afternoon or early in the evening or night of September 18th he became—to those surrounding him, to his wife—so weak and his gums bleeding so much that she returned with him to San Angelo, to the Central Hotel, arriving there in the night of September 18th. He remained in the Central Hotel from September 18th to the date of his death. From the night of September 18th until the date of his death—his death occurring on October 15, 1931—he was not, during all of that period, in bed; part of the time he was in bed and part of the time he would sit upon the bed. At times between September 18th and the date of his death—for a few days after September 18th—his gums bled so much he had hemorrhage, and physicians had to be called and morphine administered. On the night of September 18th he was again restless and sleepless. These hiccups were almost constant, with few intermittent periods between September 18, 1931, and the date of the hemorrhage, which preceded his death by only a few days. He complained during this period, between September 18th and the date of his death, of discomfort and pain in his abdomen, shortness of breath, being troubled so much that he had to be propped up and had to sit up in bed with a pillow behind him instead of lying down. Now, he was able to go to see a doctor on or about September 30, 1931, able to walk

to his office, to the doctor's office, that doctor being Dr. Marberry. Dr. Marberry found, upon examination, when P. H. Williams first came to him in the latter part of September or at the last of September, a marked condition of ascites or dropsy, and found by manipulation and examination that the liver was abnormally small. His diagnosis was cirrhosis of the liver. The prognosis was very unfavorable, he stating that he saw nothing could be done to save him. The only thing that he undertook to do was to try to alleviate, to some extent, the discomfort produced by this dropsy—alleviating that by injecting a needle in the abdomen and drawing off the fluid on several occasions, the amount of fluid running as high as two gallons. Dr. Marberry treated him once, perhaps twice, at the office. He went to see Mr. Williams at the hotel also, and performed this operation to alleviate his discomfort from the ascites. He said that no appreciable relief was obtained. Those who observed P. H. Williams noticed changes in him, physically and otherwise, and some noticed them at one time and some at another time, some placing the date early in the year 1931, some in the summer of 1931, some before, and some after the date of the accident in August, 1931. Dr. Nibling, one of the physicians in the clinic, noted that Williams was suffering from a serious disorder—such a disorder as to result in a toxic condition calculated and likely to influence or affect his nervous system and his mental powers; but Dr. Nibling stated that he did not observe unsoundness of mind. Those who were in contact with P. H. Williams and closely associated with him observed marked change, both as to his physical condition and as to his mental condition, as hereinabove outlined, and as to his personality, and as to his characteristics; and these changes had been observed and noted prior to September 18, 1931.

Now, doctor, basing your answer upon said assumed state of facts, please state whether or not, in

your opinion, P. H. Williams, on September 18, 1931, had the mental power and capacity to weigh and understand and consider the nature and effect of a business transaction, assuming that all of those facts are true.

Answer: I will answer that question assuming all of these statements are true, and assuming that, my opinion would be that he was not in a condition to know the nature and effect of the signing of the paper,"

for that the sum total of the evidence introduced on the basis of which the hypothesis was stated was insufficient to form any basis for the framing of a hypothetical question to an alienist as to the mental capacity of P. H. Williams; for that the question, taken as a whole, was too vague and indefinite in detail to form any basis for the rendering of an opinion by an alienist; for that, taken as a whole, there was no basis in the testimony for the assumption of facts stated to the witness; for that the assumption in such question that Williams had suffered a loss or lapse of memory as to recent events was objectionable on the ground that there was no specification of the things not remembered or of the surrounding circumstances or of the dates of such matters; for that the assumptions in such question, as to some signs of occasional indisposition apparent to the wife as to material or appreciable physical exertion, followed at some vague and indefinite time by a lack of material or appreciable physical exertion on the part of said Williams, as to Williams not being able to bear in his memory from one day to another directions given by him to people on his farm, as to Williams at times holding his hands to his side, as to Williams on several occasions being observed sitting in his car, drooped and downcast, as to Williams, after going to San Angelo to consult doctors, being part of the time

in bed and part of the time not, as to Williams suffering a shortening of breath so much that at times he had to sit up and be propped up, were too vague and indefinite to form any basis for the expression of opinion by an alienist as to Williams' mental capacity; for that there was no basis in the testimony for the assumption of facts stated in the question with reference to Williams not being able to bear in his memory from one day to another directions that he had given; for that the assumption in such question with reference to certain witnesses having noticed a change in Williams' condition or a marked change in condition, mentally and physically, did not inform the alienist as to what the changes were; and for that in other respects, too numerous to mention, the question was too vague and indefinite, and for that in other respects too numerous to mention there was no basis in the testimony for the facts assumed. (Twelfth Assignment of Error, Tr., p. 204.)

3. The Court erred in giving to the jury the instructions indicated by the underscoring (here shown in italics) in the following quotation quoted totidem verbis from his charge to the jury:

> "The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony.. * * * *If she has done that then she is entitled to a verdict.*
>
> * * * * * * *
>
> *"There is also an option one and an option two. Option one reading, in part, as follows: 'Accumulations of dividends at interest may be applied to in-*

crease the term of extension of insurance'; option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.'

* * * * * * *

"The Court holds that under those two options that I have read, that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now, think with me carefully—was that done in this case? *Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff.* If you find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was in truth and in fact an instrument given for the transfer of that particular dividend to Lee and Lee on the note which Mr. Williams owed Lee and Lee for the premium that was paid by them on the year before. But, no one may make such a contract as that, or any contract for that matter, unless he is in his right mind. If he was not in his right mind at that time, or, if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee and Lee, and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case he ordered, and was entitled to have that dividend purchase extended insurance.

* * * * * * *

"If you find that Mr. Williams, at the date of executing this order to Lee and Lee to collect these dividends which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee

and Lee, and that he knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff."

for that such charge expressly or impliedly indicates, but erroneously indicates, that the insured had the right, under the policy, to the use of the 1931 dividend for the purchase of extended insurance, and for that the same is contrary to the evidence and to the valid provisions of the policy which established that if the policy should lapse for the nonpayment of the premium, as it did lapse for the nonpayment of the January 10, 1931, premium, that the dividend then due should be paid in cash. (Fourth Assignment of Error, Tr., p. 196.)

4. The Court erred in giving to the jury the instructions indicated by the underscoring (here shown in italics) in the following quotation, quoted totidem verbis from his charge to the jury:

"The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * If she has done that, then she is entitled to a verdict.

"There is also an option one, and an option two. Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.'

"The Court holds that under those two options that I have read, that the earned and unused dividend at

that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now, think with me carefully—was that done in this case? *Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff.* If your find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was in truth and in fact an instrument given for the transfer of that particular dividend to Lee and Lee on the note which Mr. Williams owed Lee and Lee for the premium that was paid by them on the year before. But no one may make such a contract as that, or any contract for that matter, unless he is in his right mind. *If he was not in his right mind at that time, or if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee and Lee, and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case, he ordered and was entitled to have that dividend purchase extended insurance* • • •

"If you find that Mr. Williams, at the date of executing this order to Lee and Lee to collect these dividends which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee and Lee, and that he knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff."

for that such portion of the charge expressly or impliedly indicates, but erroneously indicates, that the insured did exercise any right in any way to use dividends for the pur-

chase of extended insurance, and for that there was no evidence of any such exercise or application within the time specified in the policy therefor, or in fact at all. (Fifth Assignment of Error, Tr., p. 198.)

5. The Court erred in giving to the jury the instructions indicated by the underscoring (here shown in italics) in the following quotation, quoted totidem verbis from his charge to the jury:

> "The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * *If she has done that, then she is entitled to a verdict.* * * *
>
> "There is also an option one, and an option two. Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.' * * *
>
> "The Court holds that under those two options that I have read, that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.
>
> "Now, think with me carefully—was that done in this case? Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff. If you find that he did not, then you will find for the defendant.
>
> "You must, of course, conclude that he did not, because there was in truth and in fact an instrument given for the transfer of that particular dividend to Lee and Lee on the note which Mr. Williams owed Lee and Lee for the premium that was paid by them

on the year before. But no one may make such a contract as that, or any contract, for that matter, unless he is in his right mind. *If he was not in his right mind at that time, or if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee and Lee*, and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case, he ordered and was entitled to have that dividend purchase extended insurance. * * *

"If you find that Mr. Williams, at the date of executing this order to Lee and Lee to collect these dividends, which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee and Lee, and that he knew what he was doing, then you should find for the defendant. *If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff,*"

for that the portion of the charge quoted submits to the jury an issue of the insured's mental incompetency and to find for the plaintiff if it found the insured mentally incompetent, and for that the evidence was insufficient to justify the submission of such issue to the jury. (Sixth Assignment of Error, Tr., p. 200.)

6. The Court erred in giving to the jury the instruction indicated by the underscoring (here shown in italics) in the following quotation totidem verbis from his charge:

"Write your verdict, please, upon the form which the clerk will give you, saying: 'We, the jury find for the plaintiff in the sum of $9,101.12 *plus* $910 *attorneys' fees, plus 12 per cent. penalty*, plus 6 per cent. interest from January 1, 1932,' "

for that the state statute with reference to attorneys' fees and penalties is unconstitutional, and for that the provision of such statute with reference to the recovery of attorneys' fees or penalties were not complied with in this case. (Thirteenth Assignment of Error, Tr., p. 210.)

7. The Court erred in overruling the special exception filed by the defendant in his answer to the petition filed in this case with reference to the recovery of attorneys' fees and penalties. (Fourteenth Assignment of Error, Tr., p. 211.)

BRIEF OF THE ARGUMENT.

FIRST SPECIFICATION OF ERROR.

"The Court erred in refusing to give to the jury the defendant's specially requested charge directing a verdict for the defendant, which charge reads as follows:

> " 'Under the competent and admissible evidence offered in this cause, the plaintiff is not entitled to recover on the policy in suit, in its original form or in any other form of insurance upon the life of Peter Hardy Williams, and you will now return a verdict for the defendant,'

for that the undisputed evidence showed that the policy sued on was not in force at the date of the death of the insured, Peter Hardy Williams, either in its original form, or in any other form of insurance on the life of the said Peter Hardy Williams" (Tr., p. 212, being section 1, as amended, of the assignments of error.)

The defendant requested, and the Court refused, the charge as above set forth in the specification of error. The defendant took due exception to the refusal of the Court to give such charge (Tr., p. 180).

FIRST PROPOSITION.

The company's contractual obligation with reference to the dividend of $74.80 of June 10, 1931, was to pay the same in cash to the policyholder. The company owed no duty, and possessed no right, even if it so desired, to substitute for a cash payment a short-term insurance in favor of the former policyholder's beneficiary. This is especially true, when the policyholder requested, and the company assented, that such dividend should be paid in cash to third persons on a valid debt of the policyholder to such

third persons and when the dividend was paid by the company in entire good faith to such third persons immediately and prior to the policyholder's death.

STATEMENT AND ARGUMENT.

The contractual obligation with reference to the dividend of $74.80 of June 10, 1931, is expressed in the policy as follows:

> "In the event * * * the policy shall lapse, the dividend then due shall be paid in cash" (Tr., p. 85, Art. 12).

The stipulation is contained in an article devoted to provisions for the automatic disposition of dividends. Such article follows another devoted to options open to the policyholder, for his choice, regarding the disposition of dividends.

Such "Dividend Options" article (so headed in the policy itself) follows with such explanatory matter as is deemed proper (Tr., p. 85):

"11. Dividend Options.	**Explanatory Matter.**
[1] Dividends may be withdrawn in cash;	
[2] or applied to the payment of premiums;	Each previous dividend had been so applied, in connection with cash payment to the company of the balance of the premium. The dividend of $74.80 was insufficient to pay the annual premium of $449.10. The policy provided for acceptance of nothing less than an annual premium; but the

11. Dividend Options.	Explanatory Matter.
	company would have accepted as little as a quarterly premium, had request for change of policy in this respect been made. But the dividend was insufficient for payment even of a quarterly premium. Hence, such method was unavailable.
[3] or left to accumulate with interest at three per cent, increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy, subject to withdrawal at any time;	No such request ever had been made. No dividends had ever been left with company.
[4] or applied to the purchase of paid-up participating additions to the policy,	No such request ever had been made. No dividend had ever been so applied. The "paid-up participating additions to the policy" thus purchased with dividends are, and always have been, known in the business as "dividend additions," or "paid-up additions."
[5] convertible into cash at any time for the amount of the original dividends or the reserve of the additions, if larger,	The company, of course, carries a reserve against such dividend additions, as well as against the policy proper, and such "dividend additions" may be surrendered for, or converted at any time into, cash for the amount of the dividend, or

11. Dividend Options.	Explanatory Matter.
	of the reserve, if larger than the dividend (the reserve being equal to the amount of the dividend plus interest but less mortality cost).
[6] but payment may be deferred by the company ninety days from the date of application therefor."	

It will be observed that there is here no option in the policyholder to request, and no promise by the company to grant, as a substitute for the dividend, any term insurance in favor of the policyholder's estate, or of the policyholder's beneficiary, or, indeed, of anyone.

Further, it will be observed that any option must be exercised before any provision for automatic disposition becomes applicable under the next succeeding article. In other words, such option must be exercised at least within the thirty-one days of grace after premium maturity. The dividend becomes available at premium maturity, and either the policyholder's selected option of disposition or the automatic disposition is put into effect by the end of the grace period.

The "Automatic Disposition" article (also thus termed in the policy) follows, with similar explanatory matter (Tr., p. 85):

"12. Automatic Disposition.	Explanatory Matter.
[1] On payment of the premium	But the premium was not paid. Hence this was inapplicable.
[2] or on the policy anni-	But further premiums

12. Automatic Disposition.	Explanatory Matter.
versary if no further premium is payable, if no other option has been elected,	were payable under the policy, that is, it had not become paid up, as, for instance, a 20-payment life policy is paid up at the end of 20 years. Hence this was inapplicable.
[3] the dividend then due shall be applied to the purchase of paid-up additions.	
[4] In the event	
[5] of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected,	But the insured did not die during the days of grace. Hence this was inapplicable.
[6] or if the policy shall lapse,	**The policy did lapse and this automatic provision became applicable.**
[7] the dividend then due shall be paid in cash.	**The dividends became payable in cash.**
[8] At the death of the insured during the continuance of the policy, the pro rata part of the dividend for the current policy year shall be paid in cash."	But death did not occur during the continuance of the policy. Hence this provision was inapplicable.

In support of her claim that (disregarding the order of the company to pay the dividend in cash to Lee & Lee and the company's actual payment of the same to Lee & Lee) the company should have liquidated the dividend of $74.80 by substituting therefor term-insurance in favor of the policyholder's beneficiary, the plaintiff, as we un-

derstand, advances three alternative contentions, urging that some one of them is proper for adoption. These are that:

Either, first,

the company should have applied the dividend of $74.80 of June 10, 1931, to the reduction of the lien indebtedness against the policy;

or, second,

the dividend, though not available until June 10, 1931, and necessary, by exercise of option, or by automatic provision, to become fixed in disposition or application within the thirty-one days of grace thereafter, should be treated as if the policyholder had previously made a request to the company to allow such dividend "to accumulate with interest at 3 per cent, increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy" within the meaning of the third dividend option in article 11, hereinbefore copied;

or, third,

the dividend of June 10, 1931, should be treated as if constituting a "paid-up addition" within the meaning of a provision of the policy and a "dividend addition" within the meaning of a statute of Texas.

The policy, as usual, contains provisions for loans and cash surrender values (Tr., p. 87, Arts. 15, 19, 23).

Also, as usual, the policy provides that in the event of nonpayment of a premium, the surrender value of the policy may be applied in any one of various ways, at the option of the policyholder, and that if no option be exercised by the policyholder the surrender value shall be automatically applied by the company in a particular manner.

The policy specifies the exact amount in figures of the cash surrender value at the end of each of various years. The amount so specified for June 10, 1931, is $910.00 (Tr., p. 88). This cash surrender value constituted the full reserve under the policy, computed, as specified therein, on the American Experience Table of Mortality, with interest at the rate of 3½ per cent, less a surrender charge of $60.00 (Tr., pp. 174, 86; Arts. 14, 15).

A statute of Texas (R. S., Art. 4732), similar in terms to statutes of numerous other states, requires that policies of life insurance issued in Texas shall contain a provision whereby the insurer shall stipulate for the payment to the insured, or for the application to the purchase of some form of insurance, upon the occasion of a premium default, of the reserve on the policy, less a certain surrender charge; but the permitted surrender charge is 2½ per cent of the face amount of the insurance, or, in this case, 2½ per cent of $10,000.00, or $250.00. Hence, the provisions of the policy in question are more favorable to the policyholder than the statute of Texas requires, in that the cash surrender value promised by the company is $910.00, whereas a figure of $720.00 ($970.00 less $250.00) would have satisfied the Texas statute.

Some further explanation of the plaintiff's three contentions will be made separately.

First Contention of Plaintiff.

The claim that the company should have applied the dividend of $74.80 of June 10, 1931, to the reduction of the lien indebtedness against the policy is not based upon any provision of contract or statute. The company's contractual obligation was to pay the dividend in cash. The company had made no reservation in policy or in loan agree-

ment of any right on its part to apply the dividend to the reduction of the lien indebtedness. On the contrary, promises by the company of loans were limited to amounts within the cash surrender value of the policy, and were entirely secured thereby. The company having promised, without reservation, to pay the dividend in cash, the policyholder could enforce such payment. Any attempt by the company at application of the dividend to reduction of the lien indebtedness would have been futile. The lien indebtedness was not even an obligation of the policyholder against which the right of set-off would exist. The loan agreement was not a note or an obligation of the policyholder to repay the sum received from the company. It was a mere assignment to, and deposit with, the company of the policy, as sole security for a certain sum received from the company (Tr., p. 91). The company's right thereunder is specified in the instrument and in the policy, and is limited to such specification. Such right, in effect, is but the single right that the insurance shall cease when, and only when, the amount of the lien and interest shall equal the cash surrender value of the policy (Tr., p. 91).

Second and Third Contentions of Plaintiff.

The second and third contentions of the plaintiff refer to the provisions of the policy applicable to the use of the surrender value upon default in premium payment.

The policy extends to the policyholder three options, labeled Options 1, 2 and 3, for the use of the surrender value. They are declared to be all of equal value. It is specified that: "If, on failure to pay a premium, no option is exercised, such value shall be applied as provided in Option 1" (Tr., p. 86, Art. 16).

It is stated that such options are granted "provided

there be no indebtedness or advances on the policy" (Tr., p. 86, Art. 16).

But, further, it is stipulated that "if there be any indebtedness or advances on this policy, the cash value shall be reduced thereby; the paid-up value shall be reduced proportionately, and the extended insurance shall be for the face value of the policy, less the indebtedness and advances and for such term as said reduced cash value will provide" (Tr., p. 88, Art. 22).

The options, together with such explanatory matter as is deemed proper, follow (Tr., pp. 87-88):

"17. Option 1—Extended Insurance.	Explanatory Matter.
[1] Applied to the extension of this policy as participating term insurance from the date to which premiums have been paid, without any further payment (Table 1).	The cash surrender value specified for June 10, 1931, was $910. Had there been no indebtedness against the policy, this $910, if this option had been exercised, or, indeed, if no option had been exercised, because Option 1, in that event, was automatic, would have been used to purchase Participating Term Insurance from the company. This is a form of insurance different from and cheaper than Ordinary Life Insurance, which was the type covered by the policy. The $910 cash surrender value would have been sufficient to provide $10,000 of "Participating Term Insurance," according to the table

17. Option 1—Extended Insurance.

Explanatory Matter.

in the policy, for 4 years 330 days, or 1,790 days, and at that rate each day's insurance would have cost $910 divided by 1,790, or between 50 and 51 cents, whereas the type of insurance granted by the policy at $449.10 per year of 365 days, cost $469.10 divided by 365, or $1.29 per day. By the terms of the above quoted provision, applicable in case of indebtedness, the indebtedness then amounting to $898.88 was deductible from the cash surrender value of $910, leaving $11.12, and such $11.12 was applicable to the purchase of extended insurance for $10,000 (less $898.88) at the rate of between 50 and 51 cents per day for $10,000 of insurance. Such sum would have purchased only 22 days' insurance, and the extension would date from June 10, 1931, and hence the sum available would not even cover the cost of the 31 days of grace after the premium maturity.

[2] The value of any paid-up additions will be

Had there been any "paid-up additions" to the

17. Option 1—Extended Insurance.

Explanatory Matter.

used to increase the term of extension.

policy purchased with dividends under the terms of the 4th dividend option under Article 11, hereinbefore copied, the value of such additions, or—which is the same thing—the reserve held by the company against such "paid-up additions," would be likewise applied to the purchase of "Participating Term Insurance," increasing or lengthening the term of such insurance. Here there were no paid-up additions. However, the contention of the plaintiff is that the dividend of June 10, 1931, should be treated as if it were a paid-up addition.

[3] Accumulations of dividends at interest may be applied to increase the term of extension.

This provision is applicable to the third dividend option under Article 11, hereinbefore copied. If the policyholder had selected this third dividend option and had left a prior dividend "to accumulate with interest at three per cent increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy subject to withdrawal at any

17. Option 1—Extended Insurance.

[4] Dividends on extended insurance shall be paid in cash and only for completed policy years."

Explanatory Matter.

time," as specified in such option, then such "accumulations of dividends at interest" would also be applied to the purchase of "Participating Term Insurance" and would lengthen the term of such insurance. Here the policyholder had made no selection of the third dividend option, and had left no dividend with the company to accumulate with interest under the terms of the option. However, the plaintiff contends that the dividend of June 10, 1931, should be treated as if it had been left with the company to accumulate under the terms of such option, even though in the same breath the plaintiff claims that instead of being left with the company to accumulate at interest, it should be immediately used by the company in the purchase of participating term insurance.

The insurance purchasable under Option 1, it will be observed, is designated as "Participating Term Insurance." The appellation

17. Option 1—Extended Insurance.

Explanatory Matter.

"Participating" indicates that such insurance will share in dividends. Hence, some dividends will be payable on such participating term insurance. This provision is a stipulation that such dividends shall be paid in cash. They shall not be used in the purchase of further participating term insurance, which would increase or lengthen the term of such insurance. In other words, they are payable in cash, just as is the dividend of June 10, 1931, under the terms of the provision applicable thereto, hereinbefore copied.

The foregoing article contains the only expressions upon which the plaintiff bases his contentions, these expressions being contained in subdivisions [2] and [3] of the article, as above copied.

However, for the information of the Court, it may be desirable to set forth, in the same manner as above, the provisions of articles 18, 19 and 20 constituting other options open to the policyholder for the use of the cash surrender value. Such provisions will indicate the choices that were open to the policyholder, and the recurrence therein of the expressions "Paid-up additions," "Accumulations of dividends at interest," and of "Dividends * * * shall be paid in cash," will illustrate the identity of the meaning of these expressions in all instances and will

throw light upon the commonness of their use and of the understanding of their significance in insurance contracts.

"18. Option 2—Paid-up Insurance.

[1] Applied to the purchase of paid-up participating insurance, on written request and the surrender of the policy before the expiration of the days of grace (Table 2).

Explanatory Matter.

If the policyholder had selected this option and there were no indebtedness against the policy, the $910, according to the policy, would purchase paid-up participating insurance of $1,600. This means that the policy would have been paid up for life for $1,600. In other words, each dollar would purchase paid-up insurance for $1,600 divided by $910, or $1.58. The effect of the provision with reference to indebtedness against the policy would have been, had this option been selected by the policyholder, that the indebtedness, $898.88, would have been deductible from the cash surrender value of $910, and the difference of $11.12 would be applied to the purchase of paid-up insurance, and the same would have purchased $17.57 of paid-up insurance.

[2] Any paid-up additions will be added to the amount of the paid-up insurance.

Paid-up additions to the policy, had any been purchased with dividends in

18. Option 2—Paid-up Insurance.

[3] Accumulations of dividends at interest may be applied to purchase additional paid-up insurance provided the total amount of paid-up insurance shall not exceed the face amount of the policy.

Explanatory Matter.

pursuance of the fourth option under Article 11, hereinbefore copied, would have been of precisely the same character as the paid-up participating insurance purchasable with the cash surrender value under this option, and the face amount of such paid-up additions would have been added to the face amount of the paid-up participating insurance purchased with the cash surrender value. But here, of course, there were no paid-up additions, and no paid-up participating insurance, and no option exercised to apply the $11.12 of remaining cash surrender value to the purchase of paid-up insurance.

Had the policyholder selected the third option under Article 11, hereinbefore copied, and left some former dividend with the company "to accumulate with interest at three per cent increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy subject to withdrawal at any time," then under this pro-

18. Option 2—Paid-up Insurance.

Explanatory Matter.

vision such accumulation of dividends at interest would be applied to purchase additional paid-up insurance, provided, however, that the total amount of paid-up insurance should not exceed the face amount of the policy.

[4] Dividends on paid-up insurance shall be paid in cash."

This provision is similar to the provision last appearing in Article 17, above quoted. The "paid-up participating insurance," it will be observed, is "participating"—that is to say, it shares in the dividends—hence dividends will be payable thereon. Such dividends under this provision are to be paid in cash and are not to be applied to the further purchase of paid-up participating insurance.

"19. Option 3—Loan.

[1] Borrowed or taken in advance in whole or in part on the sole security of the policy, on assignment thereof, less the unpaid balance of the current year's premium and any indebtedness and previous advance on this policy, at six per

19. Option 3—Loan.

cent interest, payable annually on the anniversary of the policy, interest to be discounted and paid in advance (Table 3).

Failure to repay any such advance or to pay interest shall avoid this policy whenever but not until the total indebtedness and advances hereon, with interest, shall equal or exceed the then loan value and not until one month after notice shall have been mailed by the Company to the last known address of the insured, and of the assignee, if any.

[2] The loan value will be increased by the value of any paid-up additions.

[3] The loan value, less interest to next anniversary, is available at any time during the policy year if pre-

Explanatory Matter.

Here, again, if the policyholder had selected the fourth option under Article 11 and caused some former dividend to be applied to the purchase of paid-up additions to the insurance, then the loan value would be increased by the value of the paid-up additions, or, which is the same thing, the reserve carried by the company against these paid-up additions.

19. Option 3—Loan.

miums have been paid to the end of the year. Consummation of loans other than paid-up premiums on loans in this Company may be deferred by the Company ninety days from the date of the application therefor."

Explanatory Matter.

"**20. Option 4—Cash.**

[1] Collected in cash on written surrender of the policy before the expiration of the days of grace (Table 4).

[2] The cash value will be increased by the value of any paid-up additions.

Here, again, if the policyholder had selected the fourth option under Article 11, hereinabove quoted, and had caused some prior dividend to be applied to the purchase of paid-up additions to the policy, the cash value available on surrender of the policy would be increased by the value of the paid-up additions, or, which is the same thing, the reserve carried by the company against such paid-up additions.

[3] Payment may be deferred by the Company ninety days from the date of application therefor."

The Court will have observed the repetition of the expressions "Paid-up additions," "Accumulations of dividends at interest" and "Dividends * * * shall be paid in cash" in the quoted articles. These expressions are repeated in subdivisions of the articles as follows:

"Paid-up additions."

Art. 11, sub. 4
Art. 12, sub. 3
Art. 17, sub. 2
Art. 18, sub. 1, 2
Art. 19, sub. 2
Art. 20, sub. 2

"Accumulations of dividends at interest."

Art. 11, sub. 3
Art. 17, sub. 3
Art. 18, sub. 3

"Dividends * * * shall be paid in cash."

Art. 11, sub. 1
Art. 12, sub. 7
Art. 17, sub. 4
Art. 18, sub. 4
Art. 20, sub. 1

The expressions "Dividends * * * shall be paid in cash" and "Accumulations of dividends at interest" seem to us nontechnical and involving no possibility of doubt concerning their proper interpretation.

The terms "Paid-up additions" and "Dividend additions" are technical terms. They have a perfectly definite and well-understood meaning in the insurance business, and because the plaintiff, by her pleadings, contended that the dividend of June 10, 1931, was, or should be treated

as, a "Paid-up addition" or "Dividend addition" the defendant deemed it proper to introduce evidence concerning the meaning of these terms in the insurance business. One of the witnesses was an actuary for the defendant company; the other was the actuary for the Southwestern Life Insurance Company, a Dallas, Texas, institution. Both testified that the terms had only one meaning, namely, the small paid-up insurance additions to the policy purchased by dividends; that the terms were commonly employed in the business; that they had never had any other than this meaning (Tr., pp. 143-145, 169). This evidence was uncontradicted.

Facts With Reference to Lapse of Policy and Actual Payment of Dividend.

The policyholder had paid each premium prior to that of June 10, 1931, and in so doing had applied the annual dividend as part payment (Tr., p. 159); but the policyholder had exhausted his borrowing power under his insurance in June, 1930, and, in addition, indulging the hope of improved financial condition within the ensuing twelve months, had borrowed from Lee & Lee $1,643.63 with which to maintain his insurance. But he had been unable to repay this sum even in part, and was wholly unable to settle in any way the premium of June 10, 1931. The thirty-one days of grace expired without any payment, in whole or in part, and without the specification of any option of disposition of dividend or of cash surrender value (Tr., p. 160). The evidence is undisputed that the company received no such specification (Tr., p. 160).

The company, in due course, prepared its check for the dividend of $74.80, and for dividends on other policies, as well, in favor of the policyholder, and transmitted the same to its agents, Lee & Lee. Lee & Lee, however, re-

turned the check, and, having sent their attorney to interview the policyholder with reference to the payment of the policyholder's note to them of $1,643.63, and having obtained from the policyholder an order upon the company for the payment of the dividend to them, and having, upon receipt of such order, canceled and surrendered to the policyholder the note of $1,643.63, and accepted a renewal note for the difference, transmitted the written order to the company. The order was executed by the policyholder at his own home on September 18, 1931; and the company, on September 28, 1931, transmitted its check for the dividend to Lee & Lee, which check was promptly paid.

The policyholder knew and was informed that the policy had lapsed when he executed the order of September 18, 1931; but the company, also in due course, by letter dated October 7, 1931, advised the policyholder of the fact that the policy had become null and void, and had been canceled (Tr., pp. 165-166). This notice was duly received by the policyholder prior to his death, but, according to the testimony of his son, remained at the house unopened until after the death.

No claim of mental incompetency was asserted by the plaintiff at the time of the transaction between Lee & Lee's attorney and the policyholder on September 18, 1931, though the plaintiff was in an adjoining room. No claim of such mental incompetency was asserted by anyone until after the death of the policyholder. The company had no information of any such claim until long after this suit was brought, and then only in the form of a letter received from its counsel in charge of the suit, indicating that the plaintiff was making or intended to make such claim (Tr., p. 160).

The plaintiff does not claim that the policyholder, at

any time prior to the expiration of the thirty-one days of grace, June 10, 1931, communicated to the company, or any agent of the company, any selection of option with reference to the disposition of the dividend of June 10, 1931, or of the small remaining balance of the cash surrender value, $11.12. The undisputed evidence is that the company received no information whatever concerning the policyholder's wishes on this subject, and the automatic provisions of the policy took effect.

The plaintiff's entire claim of any expression of intention or desire on the part of the policyholder with respect to the dividend disposition, at variance with the payment of the dividend in cash to Lee & Lee, is based upon a passage in a letter from Lee & Lee to the company, dated September 14, 1931. In this letter Lee & Lee returned the first dividend check to the company and advised the company of the personal loan that they had made to the policyholder the year previous for the purpose of enabling him to maintain his policy in force, and of their efforts since to collect this advance, and of their intention to bring suit against the policyholder and to garnish the dividends in the possession of the company if the policyholder declined to pay. The letter was written before they obtained the written order from the policyholder dated September 18, 1931. The passage which the plaintiff contends constitutes some expression of the policyholder on or about the 1st of September, 1931, is as follows:

> "Our agent at San Angelo did not seem to press this matter with the proper amount of energy in seeing Mr. Williams personally until finally about the 1st of September he did see Mr. Williams and Mr. Williams told him he was not going to sign the surrender voucher with any part of it made payable to Lee & Lee; that it was a crooked deal and that he was

going to have every nickel applied towards paying these policies as far as it would carry them. In the face of this cold-blooded refusal of Mr. Williams we have had our attorney prepare papers suing Mr. Williams for the note and garnishing the company for all of these dividends" (Tr., p. 97).

But it will be noted that this recites some conversation about the 1st of September, 1931, long after the policy had lapsed, the days of grace had expired, the disposition of the dividend had become automatically fixed as payable in cash, and all time for the selection of any option had expired. Also, that it was not in terms applicable to any option granted by the contract, even had the option been properly exercised within the thirty-one days of grace, and that if application to some option be forced, the expression in the letter would most nearly fit the option for the purchase of a paid-up participating addition to the policy, specified in subdivision 4 of article 11 hereinbefore copied. This option would have entitled the policyholder to a paid-up addition of $17.57, or $1.58 of paid-up insurance for each dollar of dividend applied to the purchase. But in reality the recital evinces an intention of the policyholder to permit to remain lapsed all but a small part of his insurance, obtain in cash all moneys available under such policies and use the same in reinstating and continuing in force some small portion of his insurance, and not using any of the cash to make good his personal promise and obligation to Lee & Lee for the $1,643.63 they had advanced for him the preceding year.

Little argument seems necessary or appropriate in the facts of this case.

The relationship between the plaintiff and the defendant

is purely one of contract. The defendant is not liable to the plaintiff unless it has stipulated such liability.

The contract between the parties is to be fairly interpreted. It is not to be twisted or distorted, or its plain terms altered by any process of metaphysics or dialectics in order to award the plaintiff a judgment.

It is to be interpreted in accordance with the reasonable intent of the parties gained from the language of the contract.

Obviously, when the company promised to distribute dividends, it was necessary that the contract provide when and how the company would distribute the same.

The business of insurance is concerned with the risk of death. That risk in an individual case may change greatly in a single day—even in a single minute. Any choice of alternatives, involving either an increase or a termination of the risk, should be promptly made. An insurance company must be able to know the risks for which it is liable. It cannot carry transactions along in suspense, in such wise that it will be held for the risk when that is for the advantage of the policyholder and, on the other hand, will be required to return money when, as it develops, the carrying of the risk would have been for its advantage.

By the policy provisions, the dividends were made payable by the company at the same time that premiums were made payable to the company.

As the policy provisions were designed to allow to the policyholder a grace of thirty-one days in the payment of the premium, they also afforded him the same margin of time in the selection of the desired disposition of dividends.

But the thirty one days of grace having expired, the design was that the rights of company and policyholder should become fixed with reference to dividends as well as premium default.

The parties were at liberty to agree as they pleased, no statute intervening, concerning the disposition of the dividends.

The policy provisions upon which they agreed contained many repetitions of the expression, or its equivalent, that "Dividends • • • shall be payable in cash." These are in contrast with repeated expressions that dividends may be applied in the purchase of paid up additions, or may be allowed to accumulate with the company at interest, and with repeated other expressions that the cash surrender value may be applied to the purchase of term insurance upon premium default, or may be applied to the purchase of paid up additions. The language that "dividends • • • shall be payable in cash" is plain, everyday language. There can be no question that ordinary men would understand by such language that dividends should be paid or payable in money of the country, and not in some form of substituted insurance contract.

The policy provisions in articles 11, 12, 17, 18, 19 and 20 hereinbefore quoted indicate a careful attempt to distinguish between the payment of dividends in cash and the use of dividends to purchase some form of substituted contract from the company an attempt to specify just when the dividends may or shall be applied to the purchase of such a substituted contract, and when, on the other hand, they shall be paid in cash.

Undoubtedly, in a business as highly competitive as life insurance, such attempt at distinction and specifica-

tion was designed to accord with the wishes and the interests of insurance buyers.

The automatic provision for payment of the dividend in cash, with which we are concerned in this case, is a provision applicable to the contingency that the premium has not been paid and that the policy itself has lapsed, and that the policyholder has selected no other disposition of the dividend. What fairer provision to the policyholder could there be? He has the right within the thirty-one days of grace to indicate, within the range of options allowed to him (but it will be recalled that the purchase of term insurance is not one of such options), how the dividend shall be disposed of. His omission to select some other disposition is in itself an indication of his acceptance of, and satisfaction with, the automatic provision, namely, payment in cash.

The policyholder who voluntarily has relinquished, or who, from reduced financial circumstances, has been compelled to relinquish, a policy of insurance, may profit more from a cash payment, though small, than from a substituted insurance contract continuing for only a short time.

Especially may he so profit when, as here, **he** receives the dividend (Tr., p. 89, Art. 25), whereas the substituted insurance contract advantages only his beneficiary.

The policyholder has the right and the means of determining which is the better bargain for himself. His omission to select some other disposition is an indication of his decision to accept cash.

Had he desired to receive the cash and to apply it in reduction of the lien against the policy, he could have done so. He chose not to do so.

He did not **owe** the policy lien. It was not indebtedness. It was a mere lien. A desire to apply the dividend on such lien, in the case of a lapsed policy, would be most extraordinary. It would not be the natural or expected expression of ordinary human nature.

Mr. Justice Holmes, in Orleans Parish v. New York Life Ins. Co., 216 U. S. 517, said:

> "The so-called liability of the policyholder never exists as a personal liability, it never is a debt, but is merely a deduction in account from the sum that the plaintiffs (the insurance companies) ultimately must pay. In settling that account, interest will be computed on the item for the reason that we have mentioned, but the item never could be sued for, any more than any other single item of a mutual account that always shows a balance against the would be plaintiff. In form it subsists as an item until the settlement, because interest must be charged on it. **In substance it is extinct from the beginning,** because, as was said by the judge below, **it is a payment, not a loan.**"

Wagner v. Thieriot, 197 N. Y. S. 560, affirmed by the New York Court of Appeals, 142 N. E. 295, is to the same effect.

It is plain that the company has attempted, in the various instances in which the policy of the company provides that dividends shall be payable in cash, to definitely fix and establish that cash as the limit and extent of its liability. It arranges and conducts its business, reports its liability and distributes its dividends on that basis.

Any decision disrupting this business arrangement and conduct and requiring the company, in addition to the payment of the dividend in cash, also to substitute term

insurance whenever, as it subsequently develops, that would be to the advantage of the policyholder, would be destructive of business stability, as well as of legal principles.

No policy provision contains any promise whatever that a dividend may be applied to the purchase of term insurance. The options were that dividends might be withdrawn in cash, or applied in payment of premiums, or applied to the purchase of paid-up additions to the policy, or left with the company to accumulate at interest until the maturity of the policy, subject to withdrawal in cash at any time. No ground exists in law or morals for requiring the company to grant as a substitute, after the death, a contract of term insurance which shall cover the death.

No one of the options open to the policyholder was specified by him.

If the policyholder, on some prior occasion, instead of using, as he did, the dividends, had declared to the company that he would allow such dividends to accumulate with it at interest until the maturity of the policy, then any dividends accumulated under this selection of option would, under article 11 of the policy, in the event of subsequent premium default, have been usable, at the option of the policyholder, in connection with the cash surrender value, for the purchase of term insurance.

But the policyholder, instead of allowing dividends to accumulate, had used the same; he had never notified the company that he desired or would permit dividends to accumulate with it at interest until the maturity of the policy. The dividend in question became subject on June 10, 1931, to the disposition, and choice of disposition,

of the policyholder, and so remained during the thirty-one days of grace, but at the expiration of that time, no disposition or choice having been made, the dividend became an obligation definitely payable in cash, and not otherwise. The plaintiff's claim that it should have been immediately applied to the purchase of a term insurance contract is utterly inconsistent with any actual or authorized accumulation at interest until the maturity of the policy.

To sanction such a claim would do violence to both contract and morals.

Further, the plaintiff claims that the dividend of June 10, 1931, should be treated as a "paid-up addition" to the policy. But he points to no ordinary or everyday usage anywhere constituting a dividend a "paid-up addition." Both the word "paid-up" and the word "addition" are wholly foreign to the conception of dividend. Obviously, "paid-up addition" is a term of the insurance business, and the uncontradicted evidence leaves no doubt whatever that such term neither has, nor ever has had, any other meaning than a paid-up addition to an insurance policy purchased with a dividend—the terms "paid-up addition" and "dividend addition" being synonymous.

In Gardner v. National Life Ins. Co., 1931, N. C., 161 S. E. 308, the plaintiff contended, as here, that the company should have applied a dividend to the purchase of term insurance so as to extend a lapsed policy to a date past the death of the insured. The cash surrender value of the policy less the indebtedness left a sum of $2.31, which was applied to the purchase of term insurance, but which did not extend to the death of the policyholder. It was essential to the plaintiff's purposes that she show that some additional sum should have been applied by the company to the purchase of such term insurance. The divi-

dend option provisions of the policy were very similar to those in the present case. The policyholder had elected at the time of applying for the insurance that the dividends should be "left with the company at interest unless otherwise ordered." One dividend had accrued and had been paid to him in cash. The second dividend accrued at the same time that premium default occurred. The company retained this dividend. The plaintiff claimed that it should have been applied to the purchase of term insurance. The policy in that case did not provide that dividends left with the company to accumulate at interest until the maturity of the policy should be usable in the purchase of term insurance.

The Court said:

> "The policy provides that, unless the insured shall elect otherwise prior to thirty days after any dividend is due, the same shall be held by the company, at interest, to be withdrawn by the insured at any time, or to be included in any cash settlement of the policy. Although he had notice of the dividend due on May 11, 1930, and of his right to direct its application to the payment on the premium due on said date, or to the purchase of extended insurance, the insured did not order such application. He elected that the dividend should remain with the defendant, at interest, in accordance with his direction given in his application for the policy. In view of the express provisions of the contract between the insured and the defendant, as clearly and plainly expressed in the policy, the defendant had no right, in law or in equity, to apply the dividend declared prior to May 11, 1930, and due at said date, as a payment on the semiannual premium due on May 11, 1930, or to the purchase of extended insurance. If in violation of its contract with the insured, with respect to this dividend, the defendant had so applied it, it would

have, nevertheless, been liable to the insured for the amount of the dividend, with interest, when called upon by him for its payment. There is no principle of law or equity upon which the defendant can be held liable to the plaintiff because after the death of the insured within the time for which the policy would have been extended, if the insured had directed that the dividend be applied to the purchase of extended insurance, it appeared that such application would have been to the interest of the plaintiff, as beneficiary in the policy."

In Hutchinson v. National Life Ins. Co. (1917, Mo. App.), 195 S. W. 66, it was contended that a dividend should have been applied in some way for the purchase of term insurance. The "net value" or "reserve" of the policy was usable for the purchase of term insurance, and it was contended, first, that the dividend was a part of the net value, and, this failing, it was contended that anyhow, on some ground, the dividend should have been used by the company to purchase term insurance. The Court said:

"This brings us to the final claim that the dividend should be considered as a part of the net value of the policy. The 'net value' at a given time was shown at the trial to be the 'reserve.' This is conceded, and it is the view adopted by the authorities (Rose v. Insurance Co., 153 Mo. App. 90, 132 S. W. 613; Fahle v. Insurance Co., 155 Mo. App. 15, 134 S. W. 60). The statute enacts the process whereby the net value is ascertained and does not include an unpaid dividend. On the other hand, the contract in the policy is that the unpaid dividend is to be applied in part payment of the next annual premium.

"Running through the argument for plaintiff there is to be found a confusion of statement as to the application of the dividend of $19.12, declared by de-

fendant on the 31st of December, 1913. First is the insistence that it should be applied to the payment of the premium, then follows an assumption that the dividend, thus applied, bought extended insurance. We think that does not follow. The two things are wholly disconnected and distinct matters. A sum which is to be used in payment of premiums becomes a part of the premium fund, and pays, or helps to pay, the premium which buys the regular insurance, and furnishes no part of the fund which purchases extended insurance, except as it may do so indirectly by forming a part of the reserve. The fund which buys the latter insurance is provided by law, and is ascertained after the manner pointed out in the statute; while the former is provided for by the contract, and contemplates a continued live contract. The latter is attached by law to prolong the life of a contract which, if left to its own terms, would be ended by forfeiture. Plaintiff truly says, at page 10 of the brief in her behalf, that 'the policy provided that the dividend of $19.12 should be applied as a credit on the premium.' But it is immediately added that this, at the rate per day, 'carried the insurance 118 days,' a period long beyond the date of deceased's death. The policy does provide that:

"'Dividends assigned by the company shall be applied to the reduction of each subsequent year's premium, or if the insured prefer to pay any premium or premiums in full, the dividend or dividends will be applied to the purchase of paid-up additions to the policy.'

"But, as deceased did not pay his premium due in May, 1914, this dividend of $19.12, declared the previous December, was automatically credited on that premium, reducing it from $85.75 to $66.63, but still leaving the default. The fact that it was for a less amount does not destroy its force as a forfeiture.

"Plaintiff seeks to deal with this dividend as a separate and distinct payment of a premium for the pur-

chase of extended insurance, carrying the life of the policy beyond the death of the insured. This would not be within the law, and would be outside the terms of the contract, for, as we have seen, it must be merely credited on the annual premium falling due next after the dividend is declared. But there is a provision in the policy that premiums may be paid annually, semi-annually, or quarterly, and it may be suggested that the dividend would apply as far as it would go as a quarterly payment. But the same answer could be made to this as has just been made to a full annual payment. The dividend was not sufficient to cover a quarterly payment, and if, without request from the assured, defendant had credited it as a quarterly payment, it would still have left a default. If a quarterly payment was intended to be made, it, of course, should have been for a full quarter. The defendant could not be required to accept less (Terry v. Ins. Co., 90 S. C. 1, 72 S. E. 498).

"The fact that the lawmakers, in legislating on the subject of extended insurance, have failed to provide in terms that upon default in payment of premiums, when there were dividends declared but not paid or applied, the amount of such dividends should be used in the purchase of extended insurance, is apparently conclusive that it was not intended that they should be used for that purpose. The contract provides for only two uses of unpaid dividends, one as a credit on the next annual premium, and the other to purchase of additional insurance if the insured paid the annual premium in full; and we have seen that, as the insured did not pay the premium, the dividend could only be applied as a credit thereon."

In the case of Atlantic Life Insurance Company v. Bender (1926, Va.), 13 S. E. 806, dividend options were the same as those provided for in the policy involved in suit.

but the dividends, under an automatic provision, had been applied to the purchase of paid-up additions to the policy. The policy lapsed upon the nonpayment of a premium, and after the death of the insured it was contended that the company should have used the dividends toward the purchase of term insurance. The Court held:

> "This position is not tenable; the dividends had been applied according to the terms of the policies. * * *
>
> "* * * Dividends and cash or loan values of life insurance policies do not belong to insurance unless created by statute or granted by the policies, and in the latter instance **subject to the terms and conditions contained therein.**"

In Toncich v. Home Life Ins. Co. (1932, Pa.), 163 Atl. 673, a payment of $11.40 was due to the policyholder which, under the terms of the policy, might be applied in any one of various ways. But the purchase of term insurance was not one of such methods. The plaintiff claimed that nevertheless the sum should have been applied by the company to the purchase or provision of term insurance.

The Court said:

> "On April 28, 1929, there was due a guaranteed coupon for $11.40 by virtue of a supplemental agreement as follows: 'On the second and each subsequent anniversary date of the policy, provided it be then in force, there will become due and payable in cash a coupon for the amount shown below. The insured, however, may select any one of the three following options: 1. To apply the coupon towards paying the premium then due, by surrendering it and paying in cash the full premium less the coupon.' The two remaining options are not material to this issue. Plaintiff argues that this $11.40 should have been applied

by the company towards a further extension of the policy. The statement of claim contains no averment that insured made any effort to have the coupon so applied. In the absence of any indication by the holder of what should be done, and in view of the four possible dispositions of the coupon, it is difficult to see how appellant can now claim that the coupon had the effect of extending the insurance."

Well-Understood Principles of Life Insurance.

While it seems to us unnecessary, yet for the possible convenience of the Court, particularly in the study of some cases which the plaintiff has cited, it may be well to review briefly some of the well-understood principles of the life insurance business.

It is well known that insurance computations are based on mortality tables.

There are two such tables commonly used, namely, the American Experience Table of Mortality and the Actuaries' or Combined Experience Table of Mortality.

These tables do not differ greatly.

Each table, starting with approximately 100,000 lives at age 10, indicates how many die each year. According to each table, all die before age 100. The last three die at age 95, according to the first table, and the last one at age 99 according to the second table.

It is also well known that all computations are likewise based on an assumed rate of interest, such rate being now generally 3½ per cent.

In order that there may be common basis for calculations, American practice assumes that premiums are received at the beginning of the year, and that deaths occur at the end of the year.

Hence, given the exact dates when deaths will occur, and when premiums will be paid, and the exact interest return that will be regularly received and annually compounded, each dollar being immediately invested and kept invested until disbursed on account of death, and disregarding expenses and losses and all contingencies, it is a simple mathematical problem to compute to the penny the amount of premiums that must be paid in order to meet the deaths as they occur.

These mathematically exact and requisite premiums are called "net premiums."

But as some additional charge is essential for expenses, a "loading" is placed on the net premium, and the sum constitutes the "gross premium."

It is well known that as the individual advances in age, the chance that he may die within the next twelve months increases each year. The mortality cost of insurance increases with each added year of age.

If the individual were charged each year a premium exactly sufficient, neither more nor less, to defray the mortality cost of his insurance for such year, the amount of the premium would increase from year to year.

But, as it has been found practically necessary or desirable that premiums be not thus increased from year to year, but be fixed at a level figure, it necessarily follows that this level figure must be greater than the mortality cost during the early years of the insurance, and less than the mortality cost during the later years of the insurance, the excess portions during the early years compensating for the deficits in the later years.

Hence, upon every level premium policy, the excess por-

tions or savings, from premiums and interest, accumulate from the beginning.

If still, regardless of the insurer's actual experience with mortality cost and return on investments and expenses, it be assumed that deaths have occurred just as pointed out by the mortality table and that premiums have been continuously invested at the assumed rate of interest, it is, as before, a mere mathematical problem to compute the accumulated savings, per $1,000 of insurance, at any date that may be desired.

The sums thus mathematically computed per $1,000 of insurance constitute the amount of the insurer's "reserve" against such policies.

The insurer is required by law, as a test of its solvency, to maintain such reserve. If its experience has been less favorable than the required standard of table of mortality and assumed rate of interest, the difference constitutes a loss in operation. If its experience has been more favorable than the required standard, the difference is a profit from operation, which may be distributed in the form of dividends.

These "reserve" amounts constitute that which has been paid in excess of the requirements of the assumed table of mortality and rate of interest, and thus represent to the policyholders the value of their policies.

In addition, the difference between the present worth, according to the table of mortality and the assumed rate of interest of all the premiums yet to be paid by a policyholder under his existing policy, and the present worth, similarly computed, of the premiums which he would have to pay on a new policy of the same type at his increased attained age, is exactly the amount of this "reserve."

The terms "reserve" and "value" or "net value" as applied to a policy are interchangeable. They designate precisely the same amounts.

As a test of its solvency, a life insurance company must have on hand the amount of the "reserve" against its outstandard policies, or the "net value" of its outstanding policies, computed in accordance with the table of mortality and assumed rate of interest which it uses, or which has been adopted as a standard by statute.

In its statement of assets and liabilities, a life insurance company charges itself with a liability equivalent to the "reserve" against, or the "net value" of, its outstanding policies.

The loan values and cash surrender values of policies are fixed with reference to such "reserves" or "net values."

They are within the amount of the reserves or net values, but usually constitute the reserves or net values less a surrender charge varying in amount.

The surrender charge is made for the trouble of the transaction, and, also, for the injury to the company, by way of adverse selection of risks, involved in the surrender, it being thought that, as a general rule, only the good lives surrender their policies, whereas the impaired risks are certain to continue their policies in force to the end.

An insurance company may be able to invest its funds so as to yield more than the assumed rate of interest; also, it may select its policyholders in suchwise as to effect a mortality cost less than that of the assumed table of mortality. In each case the company makes a profit.

Also, it may effect a saving in expenses from the "load-

ing" added to the net premium. Such savings augment its profit account.

From this profit account it declares dividends.

Thus, reserves and net values are entirely separate and distinct from dividends, and vice versa.

At intervals in the history of insurance, some one or more companies, particularly small companies desirous of "window-dressing" their policies to make them seem more attractive to the buyers, have issued policies containing provisions for the payment of "guaranteed dividends." These so-called "guaranteed dividends," sometimes represented by coupons, sometimes covered by a provision in the policy, are, in fact, misnomers. They are definite obligations for the payment of specific sums of money; and corresponding charges for them necessarily enter into the make-up of net premiums on the policies. For such obligations, as well as for the obligations to pay sums at death, the mathematically exact "net premiums" chargeable for the same, according to the adopted table of mortality and assumed rate of interest, of course may be computed, and, likewise, the "net value" or "reserve," as of any date, against such obligations. Both statute and company practice require the maintenance, as a test of solvency, at all times, of such "net value" or "reserve" against such contracts.

There are several well-known forms or types of insurance policies.

The first is the ordinary life type, which provides for the payment of premiums annually throughout life and for the face of the policy payable upon death.

Second, there is a limited payment type, which provides

for the face of the policy to be payable at death, but for the payment of premiums for only a limited number of years, for instance, for five years, ten years, fifteen years, twenty years; such policies being commonly known as five pay policies, ten pay policies, fifteen pay policies, twenty-pay policies.

A third type of contract is the endowment type, which provides for the face of the policy to be payable at death, but also provides for the face of the policy to be payable at the end of a specified period of years, if this precedes death. Such period of years may be five, ten, fifteen or twenty years, and such policies are commonly known as five year endowment, ten year endowment, fifteen year endowment and twenty year endowment policies.

All of such policies ordinary life, limited payment life and endowment policies are issued at level premiums, and hence all accumulate reserves from the beginning.

The premiums upon these policies naturally differ.

The fewer the premiums payable, or the sooner the policy is payable, the greater the premium rate.

The premium on a ten-year endowment contract is higher than the premium on a ten-pay policy issued at the same age, and the latter is higher than the premium on an ordinary life policy at the same age.

Another type of insurance exists, designated as term insurance. Under this type the face of the insurance is payable only in the event death occurs within a specified term, usually short—one year, two years, etc. At the end of that term the policy is at an end. There is nothing left—no cash surrender value, no reserve. The amount of premium charged is just sufficient to discharge the mortality cost for the term.

In consequence the premium is extremely low. An individual rarely wishes to insure himself against the risk of death occurring solely within a short period of time. He prefers a policy which he may maintain until he dies. Hence, little demand exists for the term policy.

Similarly, the insurance is unattractive to an insurance company. It involves the greatest amount of liability for the least premium. There is nothing from which unexpected mortality, losses in investments or expenses may be made good. It involves disproportionately heavy expense, in relation to the premium, to place the business on the books.

Hence, term insurance is not featured by any of the companies. Indeed, it is not offered generally on the market. It is reserved for writing to cover preferred risks in special circumstances.

Practically the function of term insurance is limited to its purchase with cash surrender values, upon default premium payment, as a means of giving these values in some manner to the policyholders.

Where surrender values of ordinary life, limited payment life, or endowment policies are thus employed the ordinary life, limited payment life and endowment policies are not themselves extended, but they or their values are employed in the purchase of a different and cheaper form of insurance.

Computation of Insurance Reserves or Net Values and Premiums.

We may illustrate the computation of insurance reserves or net values as follows:

Let us take the tail end of the American Experience

Table of Mortality. Of the 100,000 lives at age 10, with which the table starts, all have died by the beginning of the age 90, save 847. According to this table, the number living and the number dying each year after age 90 are as follows:

Age	Number Surviving at Commencement of Year	Deaths During Year
90	847	385
91	462	246
92	216	137
93	79	58
94	21	18
95	3	3

Let us assume that the 847 persons living at the beginning of the year, age 90, take out each a policy of $1,000 on his life, payable at death, requiring the payment of premiums annually during life. Let us assume a rate of interest of 4½ per cent, and that the annual premium required from each is $494.32. In fact, the exact premium required is nearly one half of a cent greater than that, or about $494.32½.

It is to be remembered that in all American insurance calculations it is assumed that the premiums are paid at the beginning of the year, and that deaths occur at the end of the year.

Hence the 847 persons living at the beginning of the year, age 90, pay at that time premiums of 847 × 494.32, or $418,689. This sum, improved at 4½ per cent interest, amounts at the end of the year to $437,530. At that time, according to the table, 385 deaths occur, requiring the payment in policies of $385,000, and, after deducting this

sum from the fund in hand, there is left $52,530. This balance is the exact sum which the policyholders have paid in, plus the interest on the same, and less the cost of insurance for the year; and, as it is the saving or reserve on account of the policies of the 462 surviving members, the reserve of each policy is 1/462 of $52,530, or $113.70.

Now, this sum is not only the saving or reserve on account of each policy, but is also the exact difference between the payments that the member will thereafter have to make on his policy issued at age 90 and those which he would have to make on a new policy issued at age 91. That is to say, if he entered at age 91 the annual premium would be greater than $494.32, and the present worth of the excess of such future annual premiums over $494.32, the premium at age 90, is exactly $113.70. Hence this amount is both the reserve and the **value** of the policy at the end of the year, age 90; because it represents both what has been saved or reserved for the future on account of the policy and the difference between what the policy will cost in the future and what a new policy would cost. The two are always the same.

Starting at the beginning of the year, age 91, with a fund of $52,530, there is added to it immediately the premiums paid by the 462 surviving members (462 × 494.32), amounting to $228,376, and these two sums improved with 4½ per cent interest amount at the end of the year to $293,547. At that time, according to the table, 246 deaths occur, and $246,000 must be paid in policies, thus reducing the fund to $47,547. As this fund is now held on account of only 216 policies, the reserve, or net value, of each is 1/216 of $47,547, or $220.12.

At the beginning of the year, age 92, the 216 surviving members pay in premiums 216 × 494.32, or $106,773, and

this, added to the balance of $47,547 at the end of the previous year, amounts to $154,320, and this sum, improved with 4½ per cent interest, amounts at the end of the year to $161,264. At that time, according to the table, 137 deaths occur, and, therefore, $137,000 must be paid out in policies, leaving a balance in the fund of $24,264. As this fund is held on account of only 79 policies, the reserve or net value of each is 1/79 of $24,264, or $307.14.

At the beginning of the year, age 93, the balance of $24,264 is augmented by the premiums paid by the 79 members (79 × 494.32), amounting to $39,051, and these two sums, improved with 4½ per cent interest, amount at the end of the year to $66,165. At that time 58 deaths occur, and accordingly $58,000 must be paid in policies, reducing the fund to $8,165. But as this fund is held on account, now, of only 21 policies, the reserve, or net value, of each is 1/21 of $8,165, or $388.81.

At the beginning of the year, age 94, the balance of $8,165 is increased by the premiums paid by the 21 members (21 × 494.32), amounting to $10,381, and these two sums, improved with 4½ per cent interest, amount at the end of the year to $19,380. But, as 18 deaths then occur, requiring the payment of $18,000 in policies, the balance remaining is only $1,380. This sum, however, is held on account of only 3 policies, and, therefore, the reserve, or net value, of each is one-third of that amount, or $460.

At the beginning of the year, age 95, the three surviving members pay in premiums 3 × 494.32, or $1,482.96, and this sum, added to the balance of $1,380, makes a total fund in hand at the beginning of the year of $2,862.96. This sum, improved at 4½ per cent interest, amounts at the end of the year to $2,992, lacking only $8 of enough to discharge the $3,000 of policies maturing at that time.

This difference of $8 is accounted for by the fact that we have used as the premium $494.32, whereas the amount is more nearly $494.32½. In the calculations we have included 1,628 premiums, and a difference of one cent in the amount of each premium, that is, a premium of $494.33 instead of $494.32, would have increased the fund by $16.28, disregarding interest, thus producing a surplus, with interest, of probably $10.

The statement made above, that the net value of a policy is the difference between what it will cost the policyholder in the future and what a new policy would cost him, that is to say, the difference between the present worth of the premiums yet to be paid on the policy and those necessary to be paid on a new policy taken at the attained age, is applicable to a policy that has become paid up, as well as to a policy on which premiums are continuing. For instance, on a policy that has become paid up, the policyholder has no more premiums to pay, and, therefore, the net value of such a policy at any date is the present worth of the payments that he would then have to make on a new policy, or, which is the same thing, the single premium that he would then have to pay for a paid-up policy.

Article 3050 of the Revised Statutes of Texas of 1895, which was dropped from the Statute in 1909 as unnecessary, though the term "net value" is continuously employed (Articles 4682, 4688, Revised Statutes of Texas 1925), contains an accurate definition of "net value," as follows:

> "The net value of a policy at any time shall be taken to be the net single premium which will at that time effect the insurance, less the value at that time of the future net premiums called for by the table of mortality and rate of interest designated above."

Of course, where there are no premiums to be paid the net value is the net single premium itself without deduction.

It may be well for us to illustrate here how annual premiums and net single premiums are determined. We have seen that an annual premium of $494.32 is just sufficient at age 90 to enable the company to pay the losses as they mature, in accordance with the table. But how is that figure ascertained?

Since the object is that the premiums and interest to be received shall just equal the losses to be paid, it is necessary to calculate at the beginning of the year, age 90, the present worth of all losses to be paid in the future and the number of premiums, or, rather, the present equivalent of the number of premiums, to be received in the future, and then to divide such equivalent number of premiums into the present worth of the losses, and the result must be the amount of each premium.

For instance, the present worth at the beginning of the year, age 90, of the losses to be paid in the future, each discounted at four and one-half per cent compound interest, is as follows:

$385,000 to be paid in 1 year has present worth of	$368,421
246,000 to be paid in 2 years has present worth of	225,270
137,000 to be paid in 3 years has present worth of	120,053
58,000 to be paid in 4 years has present worth of	48,637
18,000 to be paid in 5 years has present worth of	14,444
3,000 to be paid in 6 years has present worth of	2,304
Total present worth of losses	$779,129

Similarly, the equivalents now of the number of premiums to be paid in the future, such numbers being discounted at four and one-half per cent compound interest, are as follows:

847 premiums to be received now are equal now to.....	847	premiums
462 premiums to be received in 1 year are equal now to.....	442.105356	premiums
216 premiums to be received in 2 years are equal now to.....	197.797680	premiums
79 premiums to be received in 3 years are equal now to.....	69.227463	premiums
21 premiums to be received in 4 years are equal now to.....	17.609781	premiums
3 premiums to be received in 5 years are equal now to.....	2.407353	premiums
Present equivalent of premiums to be received in future.....	1,576.147633	

The amount of each premium to be received, therefore, is ascertained by dividing $779,129, the present worth of the losses, by 1,576.147633, the present equivalent of the number of premiums, and the result is $494.3248, which is the amount of each annual premium.

The net single premium at age 90 for $1,000 of insurance is as easily calculated from the foregoing figures. Since the present worth of all the losses to be paid is $779,129, and since these losses cover the 847 lives in being at the beginning of the year, age 90, the single premium necessary to be paid by each to provide for such losses is 1/847 of $779,129, or $919.858.

Now, having ascertained how to compute the net single premium at any age, and how to obtain the present worth of premiums to be paid in the future on any policy, let us inquire whether the figure of $113.70, which we have seen

is the reserve at the end of the first year of a policy issued at age 90, is also the difference between the present worth of all premiums remaining to be paid for the policy and the net single premium for new insurance taken at age 91.

The present worth of the losses to be paid after the end of the year, age 90, is as follows:

$246,000 to be paid in 1 year has present worth of	$235,407
137,000 to be paid in 2 years has present worth of	125,455
58,000 to be paid in 3 years has present worth of	50,825
18,000 to be paid in 4 years has present worth of	15,094
3,000 to be paid in 5 years has present worth of	2,407
Total present worth of losses to be paid	$429,188

As these losses cover the 462 lives surviving at the end of year, age 90, the single premium necessary to be paid by each to provide for the losses would be 1/462 of $429,188, or $928.97.

New premiums would remain to be paid by the policyholders joining at age 90 as follows:

462 premiums immediately, being equal immediately to	462	premiums
216 premiums in 1 year being equal now to	206.698608	premiums
79 premiums in 2 years being equal now to	72.342670	premiums
21 premiums in 3 years being equal now to	18.402237	premiums
3 premiums in 4 years being equal now to	2.515683	premiums
Present equivalent of number of premiums to be paid in future	761.959198	premiums

As each of these premiums will be of the same amount previously fixed, to wit, $494.32, the present equivalent of the total amount to be paid will be 761.959198 × 494.32, or $376,651. And, as there are 462 persons surviving at the end of the year, age 90, by whom these premiums are to be paid, the amount to be paid by each, that is to say, the present worth of the premiums to be paid by each is 1/462 of $376,651, or $815.26.

Deducting this sum, $815.26, the present worth of the premiums to be paid by each policyholder, from $928.97, the net single premium at the attained age for new insurance, the difference is found to be $113.71, which is the net value of each policy at that time. This figure, it will be noted, is within one cent of the figure previously named as the reserve, the difference being due merely to the elimination of fractions.

SECOND PROPOSITION.

The company's contractual obligation to pay the dividend of $74.80 of June 10, 1931, in cash to the policyholder rather than to substitute therefor term insurance for a brief period in favor of the former policyholder's beneficiary was not in contravention of the terms of any Texas statute.

STATEMENT AND ARGUMENT.

A statute of Texas contains the term "dividend addition," which corresponds with the term "paid-up addition" used in the policy.

The plaintiff's contention is that the dividend of June 10, 1931, should be treated as if included in the term "dividend addition."

The statute referred to is Article 4732 of the Revised Statutes of Texas of 1925, which specifies certain provisions the substance of which shall be contained in policies of life insurance issued in Texas.

Though subdivision 7 of the article is the one presented by the plaintiff, yet the term "dividend addition" is repeatedly used in both subdivisions 6 and 7 and consequently we set both forth with such explanatory matter as is deemed proper, as follows:

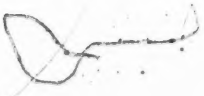
Statute.	Explanatory Matter.
"Art. 4732. Policy shall contain what.—No policy of life insurance shall be issued or delivered in this state, or be issued by a life insurance company organized under the laws of this state, unless the same shall contain provisions substantially as follows:	
• • •	
"6. That after three full years premiums have been paid, the company at any time while the policy is in force,	
will advance upon proper assignment of the policy and upon the sole security thereof	The statutory requirement that the advance shall be upon the **sole security** of the policy doubtless precludes any attempt by a company to demand the personal obligation of the policyholder to repay the amount received from the company.

Statute.	Explanatory Matter.
	The policy provision in the present instance is for a loan "on the sole security of the policy, on assignment thereof" (Tr., p. 87, Art. 19); and the loan agreement consists merely of an acknowledgment of the sum received from the company and an assignment of the policy as security therefor, with a stipulation that if and when the amount received from the company, with interest, shall exceed the cash surrender value of the policy, thereupon the insurance shall cease (Tr., pp. 91-92).
at a specified rate of interest a sum equal to, or at the option of the owner of the policy less than,	
the legal reserve at the end of the current policy year on the policy and on any dividend addition thereto	Observe the expressions "legal reserve" and "dividend addition" as often hereinbefore referred to. The legislative use of these terms implies and makes necessary complete familiarity with the same on the part of the courts. That which the legislature takes cognizance of and requires that the courts shall interpret, courts also must take cognizance of. "Divi-

Statute.	Explanatory Matter.
	dend addition," according to the uncontradicted evidence, means, and always has meant, just one thing, namely, a paid-up addition to the policy purchased with a dividend. It could not mean the dividend itself. A dividend declared immediately payable in cash, or disposable in cash according to some option of the policyholder, is utterly inconsistent with a provision for borrowing such dividend. Also, it is inconsistent with "additions to the policy," which implies something permanently added to the policy. Also, it is inconsistent with "legal reserve on * * * dividend additions," because no legal reserve exists on a dividend. Indeed, "dividend additions" can mean nothing other than that which the uncontradicted evidence of the actuaries indicates — namely, a paid-up addition to the policy purchased with a dividend. On such a paid-up addition there is, of course, a "legal reserve," as the explanation hereinbefore given of the reserve or net value of a policy shows.

Statute.

less than a sum not more than two and one half per cent of the amount insured by the policy, and of any dividend additions thereto; and



that the company may deduct from such loan value any existing indebtedness on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year, which provision may also provide that such loans may be deferred for not exceeding six months after application therefor is made. It shall also be stipu-

Explanatory Matter.

Here it will be observed a surrender charge is permitted of 2½ per cent of not only the face amount of the policy, but also the face amount "of any dividend additions thereto." This second use of the term "dividend additions" likewise indicates its similarity in nature to "the amount insured by the policy." If the policy is of $10,000 and the dividend addition is of $152, the permitted surrender charge is 2½ per cent of $10,152. This expression plainly shows that the dividend addition is an increased amount of insurance added to the face of the policy.

Statute.	Explanatory Matter.
lated in the policy that failure to repay any such advance, or to pay interest, shall not void the policy until the total indebtedness thereon to the company shall equal or exceed the loan value. No condition other than as herein provided shall be exacted as a prerequisite to any such advance.	
This provision shall not be required in term insurances, nor in pure endowments issued or granted as original policies, or in exchange for lapsed or surrendered policies.	Here also is legislative recognition of the type of insurance hereinbefore referred to as "term insurance," also of the fact that such type of insurance is radically different from other types referred to. While a paid-up term insurance, such as is purchased with the cash surrender value of a lapsed or surrendered policy, has a reserve or net value, that reserve or net value is continuously depleted during the term, and by the end of the term is entirely exhausted. The reserve on such a policy covers merely the mortality cost of the insurance during the term. When the term expires the insurance is at an end. It has no reserve, no cash sur-

Statute.	Explanatory Matter.
	render value—indeed, nothing.
No provision herein shall compel any company to loan on any policy an amount greater than ninety-seven and one-half per centum of the face value thereof, including net dividend additions thereto.	This provision merely makes certain by repetition the permitted surrender charge of 2½ per cent of the amount insured by the policy and of any dividend additions thereto. This third use of the term "dividend additions" again clearly indicates that it constitutes additional insurance purchased with a dividend, just as the uncontradicted evidence in the case shows.
"7. A provision which, in event of default in premium payments, after premiums shall have paid for three full years,	This subdivision is the subdivision on which the plaintiff relies. The prior subdivision just quoted relates to loans on policies. This subdivision relates to premium defaults.
shall secure to the owner of the policy a stipulated form of insurance,	Observe that the requirement is merely for: **a** or **some** "stipulated form of insurance"—not necessarily "term insurance"; indeed, not any form specified by the legislature but rather on the contrary **any form that may be stipulated by the parties.** A paid-up addition to the policy is a form of insurance, and this, as a rule, is the stipulated form.

Statute.	Explanatory Matter.
	This was the form of insurance stipulated in the present case by the fourth subdivision of Article 11 (Dividend options) hereinbefore copied. The policy provision so stipulating is in exact compliance with the statute.
the net value of which shall be at least equal to the reserve at the date of default on the policy,	Here again are legislative employments of the terms "net value" and "reserve" so often hereinbefore referred to. The reserve (less surrender charge covered by a subsequent clause) is to be used to purchase the "stipulated form of insurance" and the effect of this clause is to prevent the insurer from imposing any loading or charge for expenses for its issuance of the "stipulated form of insurance" because the "net value" of the "stipulated form of insurance" must not be less than the "reserve" purchasing the same. Hence the "stipulated form of insurance" is to be acquired solely for the net p r e m i u m mathematically requisite to be charged for such insurance as hereinbefore explained, and such net premium at the issuance of

Statute.	Explanatory Matter.
	the stipulated form of insurance is exactly the net value of the stipulated form of insurance at such time.
and on any dividend additions thereto,	This is the expression which the plaintiff contends includes the dividend of June 10, 1931. The plaintiff's contention, as hereinbefore often explained, is that a dividend should be treated as a "dividend addition" whereas it plainly appears from the uncontradicted evidence and from the repeated use of this same term "dividend additions," in subdivision 6 of the statute hereinbefore copied that the term "dividend additions" means and always has meant, in the insurance business, merely paid-up additions to the policy purchased with dividends.
specifying the mortality table and rate of interest adopted for computing such reserve,	Here again is evidence of legislative familiarity with the fact that "reserves" are computed in accordance with an adopted mortality table and rate of interest.
less a sum not more than two and one-half per cent of the amount insured by the policy, and of any existing dividend additions thereto,	Here again is legislative permission that there may be deducted from the reserve, as a surrender charge, 2½ per cent of the amount insured by the policy and

Statute.	Explanatory Matter.
	also of any existing dividend additions thereto. Two and one-half per cent of $10,000, the face of the policy in question, is $250. This was the legally permissible surrender charge. The surrender charge employed by the defendant was only $60. Here also in this the fifth use of the term "dividend additions" in subdivisions 6 and 7, it appears again that dividend additions correspond to the amount insured by the policy, that, in other words, dividend additions are additional amounts of insurance purchased by dividends just as the uncontradicted evidence shows.
and less any existing indebtedness to the company on the policy.	Here is legislative permission that indebtedness to the company on the policy may be deducted from the reserve.
Such provision shall stipulate that the policy may be surrendered to the company at its home office within one month from date of default for a specified cash value at least equal to the sum which would otherwise be available for the purchase of insurance, as aforesaid,	Here is merely a provision that the cash surrender value shall be payable in cash on surrender of the policy within one month from date of default.

Statute.	Explanatory Matter.
and may stipulate that the company may defer payment for not more than six months after the application therefor is made.	
This provision shall not be required in term insurances."	Here again is legislative recognition of the radical difference between "term insurances" and other insurances as hereinbefore explained.

No argument seems necessary to expose the error of the plaintiff's contention that a dividend declared and ready for payment is a "dividend addition" to the policy. The uncontradicted evidence of the two actuaries offered by the plaintiff conclusively establishes the one meaning which the term "dividend additions" has and always has had among those engaged in the insurance business.

Indeed, no court familiar with the principles of such business could entertain, for a moment, any other idea of the term.

But courts cannot be omniscient, and courts not familiar with the principles and terminology of the business sometimes have evinced confusion over insurance terms, and consequently have been guilty of some errors of expression in their opinions, and also of some, though fewer, errors of substantive decision.

But the business is of such great importance in the national economy and it so intimately affects substantially the whole of the population, that the greatest importance exists that its principles and terminology be clearly un-

derstood whenever a subject matter is involved that affects, in principle, not one policyholder only, and not one contract only, but the entire business.

A question sometimes has been suggested whether an attempt should not be made by witnesses to develop, upon the trial of a case, a full explanation of the principles and of the terminology of the business. But the frequency with which a familiarity with such principles and terminology is required for the determination of controversies precludes the introduction of such evidence on each occasion, and the crowded condition of trial court dockets and the circumstances surrounding trials in courts of first instance are quite unfavorable for the introduction of such evidence on any occasion. Indeed, in any case, offered evidence of such character, unless quite limited in its scope (as was the evidence of the actuaries here—such evidence being limited to the signification of the terms "dividend additions" and "paid-up additions"—the issue regarding the same being the only issue intimated on the plaintiff's pleading) would certainly be excluded by the trial judge as irrelevant to any issue in the case.

But the frequency of insurance controversies requiring a familiarity with the principles and terminology of the business, and the vast number of people affected by the business undoubtedly bring such principles and terminology within the realm of judicial knowledge.

And, indeed, the legislative use of insurance terms, which it is the duty of the courts to interpret, makes it necessary for the courts at all times to have a familiarity with the principles and the terminology of the business.

Returning to the subject of the statute presented by the plaintiff, we quote from the Supreme Court of Texas

in Gilley v. Missouri State Life Insurance Company, 116 Tex. 43, 49, 50, 273 S. W. 825, 285 S. W. 807, as follows:

> "The provision of the law which requires that the policy shall secure to the owners a stipulated form of insurance, whether paid-up or extended insurance, designates that such insurance shall be of a net value **equal to** the reserve to the date of default, **less** a sum not more than two and one-half per cent of the amount insured by the policy. The law clearly recognizes the rule adopted by insurance companies, in arriving at the value of the reserve of policies, to first deduct from the excess in current premiums two and one-half per cent of the amount of the policy in the nature of a carrying charge; and, if there be an amount left, it represents the real reserve, which may be used for the purpose of obtaining a loan, paid-up insurance, or extended insurance, as the insured may elect. * * * If this two and one-half per cent be deducted as the law contemplates, and as it must have actually been done by the company, the policy in fact had no reserve value at all."

Thus the Court said, in that case, if the permitted surrender charge of 2½ per cent were deducted from the amount which otherwise was required by law to be paid in cash to the policyholder, or used to purchase a stipulated form of insurance, there was nothing left, and that the statute was inapplicable to the circumstances.

The same condition existed here, even if the plaintiff be indulged in the whole of his contention. In other words, if a computation is made of the figures involved in his contention it will be found that the statute is nugatory, for that if the dividend of $74.80 be added to the entire reserve of $970.00, a sum is obtained of $1,044.80, and if from this sum be deducted the statutorily permitted sur-

render charge of $250.00, a difference is obtained of $794.80, and if an attempt be then made to discharge with this sum the indebtedness of $898.88, it is found that the sum lacks $104.08 of meeting the indebtedness, and, of course, leaves absolutely nothing for payment in cash or for use in purchasing any form of stipulated insurance.

THIRD PROPOSITION.

The pretended evidence of mental incompetency was without probative force to raise an issue of mental incompetency for submission to the jury.

STATEMENT.

A check covering the 1931 dividends due on the policy in suit, as well as other policies issued to P. H. Williams, was sent by the insurance company to their agents at Dallas, Lee & Lee. Such check was returned to the company by Lee & Lee, with a letter dated September 14, 1931, in which they stated that their attorney was preparing to sue Williams for the amount that he owed them on advances that they had made toward paying his premiums in 1930, and that they would have a writ of garnishment issued and served upon the company (Tr., pp. 94-96).

Accordingly, on September 18, 1931, George Lee, attorney for Lee & Lee, went to San Angelo and there met his brother-in-law, Hervey Humlong, a resident of San Angelo, engaged in the ranching and gravel businesses. Williams was on his ranch at the time, about forty-five minutes from San Angelo by automobile. Between 10 and 10:30 in the morning George Lee and Humlong left San Angelo for the ranch, and when they arrived at the ranch they knocked on the front door of Williams' home, but no one responded to the knock. The two then drove further up the ranch,

in the direction given them by Mexicans working on the ranch, for finding Williams. Unable to locate him, they returned by way of the ranch house, and this time Williams went to the door fully dressed and admitted them to the front room of the house, where, according to these two witnesses, a conversation of from half an hour to forty-five minutes, or even possibly an hour, took place, George Lee told Williams that he had come to ask Williams to execute an instrument releasing the dividends on his policies to Lee & Lee in order that they might be credited on the note that he had given to Lee & Lee for the advances on previous premiums (Tr., pp. 149, 150, 145, 146).

Williams replied that he was "peeved" at the company and did not wish to sign the instrument. He said that he was entitled to the dividends, that he did not think he had been treated fairly, and that he didn't feel like giving those dividends to Lee & Lee, although he admitted his indebtedness to Lee & Lee (Tr., pp. 150, 152).

George Lee argued that the dividends really ought to go to Lee & Lee, and that Williams was morally bound to transfer them to Lee & Lee, but advised Williams that the dividends belonged to him unless he was willing to transfer them to Lee & Lee (Tr., pp. 152, 155).

Realizing that Williams was rather irritable and discourteous, and that George Lee was not making much headway with his argument with Williams in the latter's then frame of mind, Humlong injected himself into the conversation, and began to talk with Williams about other matters. As both were interested in ranching and in the oil business, Humlong directed the conversation to such topics. Williams told Humlong where he got his herd of cattle, how he was trying to build it up, and how proud

he was of it. He also mentioned that he had a large amount of oats stored in his bins that he was holding for a better price. Gradually Williams got into a better frame of mind, and George Lee renewed his request and repeated his arguments (Tr., pp. 155 157, 146, 147).

Finally Williams said, "Well, there is nothing to do, I guess, but to sign this thing, but I am sore about it." Thereupon he signed the order directing the payment of the dividends to Lee & Lee, which is set forth on page 150 of the transcript. Williams never did get to where he was delighted to sign the instrument. According to George Lee, Williams did not jump at the opportunity, but gave his consent rather reluctantly. But Williams' attitude had changed from one of hostility to one of pleasantness and courtesy. He walked with Humlong and George Lee to the front gate, where their automobile was parked, and again engaged in more conversation about cattle and such matters (Tr., pp. 156, 146-148).

During the course of the conversation Williams told George Lee and Humlong that he had had his teeth extracted "recently" according to Lee, "the day before" according to Humlong, and he was expectorating some during the conversation, but neither saw him spit up blood. They did not examine the sputum to see whether it was tinged with blood. In the beginning he said that he had been losing sleep and was not feeling well, on account of having had his teeth pulled, and that his gums were swollen. But before they parted he was feeling a whole lot better (Tr., pp. 147, 155).

George Lee testified that Williams understood thoroughly that it was the dividends on all of his policies that he was directing the payment of to Lee & Lee (Tr., p. 152). Williams said that he was not suffering pain, though his

teeth had given him some trouble, that his gums were swollen, and that he could talk only with difficulty. Williams did not show that he was in any pain (Tr., p. 153).

When asked as to the state of Williams' mind, George Lee stated:

> "I did not notice any variation in the intelligence of Mr. Williams' conversation at any time. He seemed to me to be perfectly rational all the way through. I did not notice his closing his eyes or being drowsy or outwardly manifesting any sleepiness. I did not notice any peculiar or unusual, abnormal expression out of his eyes" (Tr., p. 157).

Asked whether he made any observation as to Williams' mental condition during the course of the conversation, Lee replied: "Yes, sir; I observed him very closely." Asked as to what his observation was as to Williams' mental condition, Lee said: "Well, he appeared perfectly normal." The witness observed no forgetfulness on Williams' part and no lack of understanding of the conversation. On the contrary, he testified that Williams seemed to understand the whole conversation, and that he talked rationally (Tr., pp. 151-152).

Likewise, Humlong testified that he did not observe anything in Williams' conversation or in any talk on his part that was irrational. Humlong did not observe any forgetfulness on Williams' part or any unnatural or peculiar look out of the eyes (Tr., p. 147).

The only other two witnesses to testify as to what happened while Lee and Humlong were on the ranch that morning were Mrs. Williams, the plaintiff, and a hired hand on the ranch, Jeff Jordan.

Mrs. Williams testified that the conversation with Lee

and Humlong lasted, "anyway, two hours" (Tr., p. 106). One cannot read her testimony, however, without being impressed that Mrs. Williams had a natural bent for exaggeration.

Mrs. Williams was in the dining room, kitchen and back porch, engaged in preparing dinner. She did not pay any attention to the conversation until she heard the name "Potect" repeated several times, and she knew by that that they were talking about life insurance.

To use her own words, all else that she heard of the conversation was as follows:

> "One man would talk, and then the other would talk. One would say, 'It is this way, Mr. Williams,' and they would talk and talk. Then Mr. Williams would say, 'Well, gentlemen, I am a sick man today; I am not able to do anything today. I will be in town in a few days and see you there.' About the time he would get the sentence halfway out, the other man would start up and say, 'But this is how it is, Mr. Williams,' and by that time the other man would come in."

She knew that the two strangers called to discuss business with her husband. She knew that her husband was discussing business with them. It never occurred to her to enter the room in which the strangers were discussing business with her husband and to inform them that her husband was mentally incompetent and unable to discuss business with them. Nor did it occur to her to interfere with her husband or to dissuade him from transacting business. It did not occur to her that he needed any assistance in the transaction of business. Indeed, she did not testify that lack of mental capacity existed at any time.

In response to an inquiry as to whether she heard her husband say that he would sign, or was willing to sign, Mrs. Williams replied: "I didn't know there was anything concerning signing; I just heard them say those words. Every sentence he would start, he would tell them he was a sick man and was not able to talk to them" (Tr., p. 106).

The house was a small five-room house, the living room being about ten by twenty feet, and each of the other rooms about ten by ten feet. As it was a hot day, everything was open, and Mrs. Williams, from where she was working, saw her husband sitting in a big rocking chair, "kinda stooped down this way" part of the time, and part of the time moving around. A little after the two men left she went in there and found that Mr. Williams was "just slumped down in his chair, like this, down and out." She took him by the arm and helped him up. He said that he did not want any dinner, but she insisted that he take some coffee, which he just tasted. He sat down on the bed and took "some aspirins." She took his temperature, and found that it was between 102 and 103 (Tr., pp. 106-107).

Jeff Jordan came into the house at noon for lunch while the two men were still there. He and Mrs. Williams waited a while, and then they had dinner. He was sitting at the table, where he could see Williams, but not the other two men. "They were talking to him about signing some papers. I heard him tell them two or three times 'No'; that he wouldn't do it; that he was not in good shape to sign papers; that he was too sick," was Jordan's testimony as to what he heard.

When Jordan left, about forty minutes after he had arrived, Williams had not given his consent to signing the papers (Tr., p. 117).

On cross-examination Jordan testified:

> "Two or three times I heard something about signing papers, or Mr. Williams saying he didn't want to sign some papers. He was sitting at the table when I heard that. Mrs. Williams was at the table, too. I suppose that she could have heard anything I heard then" (Tr., p. 119).

So it appears that while Mrs. Williams and Jordan were both at the same table, the only thing of the whole conversation Jordan heard was about the signing of papers, and Mrs. Williams didn't hear anything about the signing of the papers, though Jordan said that she, being there at the same table with him, could have heard what he heard.

Neither Mrs. Williams nor Jeff Jordan testified that P. H. Williams was out of his mind or conversed irrationally at any time on that same day, to wit, September 18, 1931, or on any other day. Neither testified that he was flighty, or under the influence of a drug, or that he failed to recognize anyone. In fact, neither witness testified that there was anything the matter with Williams' mind either before, during or after the conversation of September 18, 1931.

We glean from other portions of Mrs. Williams' testimony that she and P. H. Williams had been married for about thirty years; that he was working in the oil fields as a day laborer when she married him, and that he was connected with the oil business most of their married life; that, commencing in 1918, he bought machinery and drilled wells either for other people or for himself; that later he drilled for himself a well at Big Lake and made quite a bit of money; that when he sold his lease there he

bought the ranch on which they later lived; that he had about 1,000 acres, one-half of which was in cultivation and one-half in pasture, on which he had some live stock (Tr., pp. 103, 104).

Mrs. Williams related that her husband had been a sick man since the spring of 1931; that he was much worse from the middle of August, when he was kicked in the abdomen and other portions of his body by a bull yearling; that he was bothered with hiccups from then on until he died. She testified that after the injury in the middle of August he was not able actively to pursue his business of farming and ranching (Tr., p. 103). But from other witnesses of the plaintiff we shall see that he continued to give directions to the ranch hands.

Between September 10th and September 16th, Williams went through Dr. Nibling's clinic, where X-ray pictures were made of him, and where his sputum and urine were examined. His urine showed some sugar. As a result of the X-rays and the history given, Dr. Nibling's diagnosis was that Williams had trouble with his liver and gall bladder, either malignant or serious, and that it could have been cirrhosis of the liver or cancer of the liver. Dr. Nibling was also of opinion that Williams was absorbing pus as the result of infection around his gums and teeth, and he advised that the teeth be pulled (Tr., pp. 109-111). Accordingly, Dr. Chase pulled, on the morning of September 17, 1931, fourteen teeth, all of the teeth that Williams had. Dr. Chase found that some of the teeth were abscessed and that there was considerable bone destruction. He administered "anaesthesia" before extracting the teeth, and he observed that Williams had a nervous condition and that his physical condition was not good. He did not testify that he observed that anything was the matter with Williams' mind (Tr., p. 109).

After the teeth were pulled Williams returned to his hotel in San Angelo, but being nervous and restless, he, with his wife, drove back to their farm after sundown (Tr., p. 105).

Mrs. Williams testified that Williams had practically no rest or sleep the night of the 17th; that he was bothered with hiccups all night, and that his teeth bled "terribly" all through the night; that he wouldn't eat that night or the next morning, and that the next morning he had fever between 101 and 102 (Tr., p. 105). She testified that on discovering, after the conversation with George Lee and Humlong, that her husband had fever around 102 or 103, she had her son come for them, and they took Williams back that afternoon to San Angelo, to the hotel. They were unable to get Dr. Nibling, but about 11 o'clock that night (Tr., p. 121) a Dr. McAnulty gave Williams a hypodermic because of the hiccuping. According to Mrs. Williams, his teeth had bled "almost in a stream" the whole time, from the time they had been pulled out. After the hypodermic Williams evidently went to sleep, because he waked up about 3 o'clock on the morning of the 19th with the hiccups and with his teeth bleeding "almost in a stream;" and a nurse in the hotel, upon instructions from Dr. Nibling, packed his gums (Tr., p. 107).

Dr. Nibling testified also that on the 20th and 21st of September he saw Williams, and that Williams was nervous and more or less unstrung; that Williams was spitting blood and sitting on the edge of the bed, and had a bucket by the bed where he could expectorate; that Williams wouldn't lie down, and that he only tried to make Williams comfortable with respect to his pain by giving him a hypodermic. Dr. Nibling testified that the condition of Williams' teeth and their extraction was calculated to

cause a general upset of Williams' whole mechanism, and a more rapid absorption of pus for the time being. He added that a poisonous condition upsets the mental equilibrium (Tr., pp. 111, 112).

Dr. Nibling was cross-examined as to what he found concerning Williams' mental condition on the occasions of his various physical examinations and consultations, and, though he was a witness for the plaintiff, his testimony on cross-examination was so frank and important that we now quote it:

"Q. Did you observe anything abnormal about his mind at that time (September 16th)?

A. Not in particular.

Q. Did you observe anything abnormal about his mind the day before that, or the day before that?

A. No, sir. Nothing abnormal that you could put your finger on. **He talked sensibly.**

Q. Do you remember any topic of conversation carried on between the two of you?

A. No, sir; I don't know, other than his ailments—his condition.

Q. As far as you knew, he was mentally sound at the time you examined him?

A. At that time; yes, sir.

Q. And at all other times that you examined him?

A. Yes, sir; that is right.

Q. Was he mentally sound on the 20th and 21st of September?

A. He was a sick man, but **he appeared to be in his right mind.**

Q. He was suffering pain, but **you noticed nothing the matter with his mind** on any of those days?

A. **No, sir; I did not**" (Tr., pp. 112, 113).

Williams changed doctors about October 1st and thereafter had Dr. Marberry (Tr., p. 108). Dr. Marberry had

no X-rays made, but diagnosed the case as cirrhosis of the liver and abdominal dropsy. He testified that when there is a good deal of infection, and the blood vessels become distended, and the patient has to be tapped in order that the poison may be drawn off, there is a reaction that enfeebles the whole system, both body and mind. He had to tap Mr. Williams two or three times to draw off the fluid. He testified that his treatment was only a palliative measure, because Williams was in a manner dead during the time he treated him, and Williams died two weeks after the doctor first saw him (not when Williams first went to see the doctor; he walked to the doctor's office [Tr., p. 135]). On cross-examination the witness admitted that before the disease reaches such an acute stage that the patient has to be tapped, the patient's condition varies, and that he will have his "ups and downs." Dr. Marberry did not attempt to testify as to what P. H. Williams' mental or physical condition might have been on or about September 18, 1931, and, of course, he did not see him till September 30, or October 1, 1931 (Tr., pp. 113-116).

At his death Williams was only 55 years of age, having been born December 10, 1875 (Tr., p. 162).

The witness Jordan testified to noticing a change in Williams after the bull injury; that Williams didn't seem like himself; that he would be sitting around and studying "a right smart"; that he might take several minutes before answering something said to him by Jordan; that he would tell Jordan to do a piece of work, and later, forgetting the instruction, would want to know why Jordan was doing it; that he would jump on Jordan for not being able to accomplish work that Jordan didn't consider any man could do in the time allotted by Williams. Once Williams and Jordan were counting cattle, and, according to

Jordan, Williams forgot the count and took Jordan's count. After the injury Williams didn't do any physical work, though he did help count the cattle, and he continued to give the men working for him directions now and then, as the previous testimony shows (Tr., pp. 116-118).

H. G. Whittaker, engaged in the employment and feed business at San Angelo, noticed a physical change in Williams "a good while" before the latter's death. He placed the time of change as being eight to ten months before giving his testimony, which was some two to four months after Williams' death (Tr., p. 119).

Mrs. J. P. Webb, who operated the hotel where Mr. and Mrs. Williams stayed, corroborated some of the details of Williams' sickness, particularly on the night of the 18th of September. She said, moreover, that while Williams was sick there at her hotel she once tried to give him some medicine and he refused to take it and spit the medicine right in her face, and that about eight or ten days before his death he grabbed her by the arm and clinched it and stuck his nails into her flesh (Tr., pp. 120-122).

Jim Mabry, another hired hand on the ranch, narrated the details of the injury from the bull and his observation of a change in Williams' condition during the spring and summer of 1931. In counting the stock he noticed that Williams would invariably find some brute missing that actually was not missing—that he always made a mistake in the count; that he would give orders that he deemed impossible of performance; that he would have the middle of an irrigation ditch cleaned, leaving both ends dirty, and then try to force water down through the ditch; that he would come out to the field in his car and, instead of getting out, as he usually did, he would lean on the steering

wheel and apparently go to sleep, or be in a dazed condition, for from ten minutes to half an hour. After the injury from the bull Williams would walk around where Mabry was working, but he walked with a slight stoop, holding his hands on his stomach. He did not do physical work after the injury, but he continued to give Mabry orders up until the time Mabry left on September 3rd. It had not been Williams' practice to be a regular hand even prior to the injury; he just helped out on special occasions (Tr., pp. 122-124).

George J. Bailey, in the garage business in San Angelo, testified that he noticed a change in Williams in the spring or summer of 1931. He didn't see as much of Williams as he used to. Williams was indebted to him and one day, some four or six weeks before Williams died, Williams intimated to him that he was contemplating ending it all and letting his insurance pay his bills (Tr., pp. 124, 125).

A. E. Henderson, an oil well driller, testified that he drilled for Williams a well near Barnhart, Texas, to a depth of 8,900 feet; that it was a dry hole, and that it must have cost Williams about $150,000. Several days before the well was abandoned Williams realized it was condemned, and said he believed he would get his gun out and let the insurance company pay his debts. Williams, however, didn't do this. He had the dry hole plugged in September, 1930, and in the fall and winter had Henderson drill two more wells that were dry holes, each at a cost of about $20,000. Henderson noticed a change in Williams' condition after the completion of the deep hole in September, 1930. He noticed that Williams aged fast, was not as patient as formerly, and was more given to finding fault about little things. While the last test he ever put down was being drilled, the countershaft and the engine

were out of line. Henderson thought that the countershaft ought to be moved, but Williams insisted that the engine be moved. Henderson ignored instructions and moved the countershaft and didn't move the engine. A few days later Williams came back, noticed the engine had not been moved, and demanded that it be moved, but finally gave up and drove away. Later he came back, started to move the engine, but finally left it where it was. At the end of February the witness and Williams had an altercation, during which Williams struck the witness in the face. At the time Williams was sitting in his car and the witness thought that Williams either made a motion to get a gun or else to unlatch the car door. In the summer and fall of 1931 the witness saw Williams frequently in San Angelo, and Williams appeared to be much broken in spirit and health, to go bent over and absorbed in himself, without noticing other people much. Williams continued to refuse to speak to the witness. Once, in July or August, the witness saw Williams park his car by a bank downtown and then remain in the car for about 45 minutes, slumped over the wheel with his arm on it (Tr., pp. 126-129).

Grover C. Parrish testified that he was an oil well driller, and that he noticed a change in Williams after Williams finished the deep well and lost his money; that after that Williams seemed to age and to be "down and out," and not have much to say to anybody (Tr., p. 129).

Joe Stocks, engaged in the sheep business on a near-by ranch, remembered noticing a change in Williams in the summer of 1931. He noticed that Williams was bothered and worried about business, and was irritable. He recalled that Williams had a difficulty with a boy on his place and that the boy struck Williams over the head with an automobile crank. On one occasion, about June 1, 1931, the

witness agreed to pasture some cattle for Williams, and then Williams forgot about it until the witness reminded Williams of the agreement thirty or forty days later. Then Williams wanted to exchange some grain for the grass in the pasture, and they agreed on a price and he let the witness have 400 bushels. Later, when they went to settle, Williams had charged the witness for only 200 bushels (Tr., p. 130).

There was no other evidence by anyone who had ever seen Williams bearing on Williams' physical or mental condition at the time he executed the order transferring the dividends to Lee & Lee.

Dr. F. S. White, an alienist who had had several years experience with some state institutions for the insane in Texas, and who had operated a private sanitarium for nervous and mental diseases during a portion of the time, was called to the stand by the plaintiff. He was asked a long hypothetical question, containing a statement of some of the facts heretofore narrated, and set out on pages 132-136 of the transcript. The witness was asked to state whether, in his opinion, P. H. Williams, on September 18, 1931, had "the mental power and capacity to weigh and understand and consider the nature and effect of a business transaction," and the witness was asked to base his answer upon the assumed state of facts.

Over the objections of the defendant, the witness answered:

> "I will answer that question assuming all of these statements are true, and, assuming that, my opinion would be that he was not in a condition to know the nature and effect of the signing of the paper" (Tr., pp. 136-139).

The facts stated in the hypothetical question included none of the conversation that took place between Williams and George Lee and Humlong as narrated by the latter two, or as narrated by Mrs. Williams or Jeff Jordan. In fact, there was no testimony in the record from either Lee or Humlong at the time that the alienist was on the witness stand. The hypothetical statement contained no mention of the fact that on the morning of the conversation Williams was fully dressed and responded to the knock at the door, or that, at the close of the conversation, he voluntarily walked out to the front gate where Lee and Humlong's car was parked and engaged in pleasantries about cattle and other topics before returning to the house. It included a reference to the testimony of Williams' physician, brought out on cross-examination, to the effect that he did not observe unsoundness of mind at some period not stated, but contained nothing to show that such physician, just two days before and just two days after the act of signing, found nothing the matter with Williams' mind when he examined Williams, and that Williams talked sensibly when he was in the physician's presence.

On cross-examination Dr. White, in recounting the facts that he assumed and relied on, recalled testimony to the effect that, during the conversation with Lee and Humlong, Williams said he was a sick man and not in a condition to attend to business, and the alienist said that such testimony showed that Williams "realized his condition." The witness also added that an important factor upon which he based his answer that, in his judgment, Williams was not in a condition to know the nature and effect of the signing of the instrument, was the fact that Williams had been bleeding "for two or three days—something like that—and rather extensively." There was no statement in the

hypothetical question, or in the evidence, that warranted the doctor's assumption of extensive bleeding for two or three days prior to Williams' act of signing the instrument (Tr., pp. 141-143). Williams' teeth were extracted only twenty-four hours before the act of signing, and at no time prior to the act of signing, and not until about eleven or fifteen hours after such signing, did Williams' bleeding gums require or receive medical treatment. He was taken to San Angelo on the afternoon of the 18th, because Mrs. Williams got scared on account of the rise of his temperature to 102 and a fraction. Even then they did not start for San Angelo until it got cooler, and after they arrived they did not immediately summon a physician, but about 11 o'clock that night a physician was called to give Williams a hypodermic, according to Mrs. Williams, not because he was bleeding, but because "Mr. Williams was hiccuping so terribly" (Tr., p. 107).

ARGUMENT.

There being a presumption of mental capacity, the burden was on the plaintiff to establish the lack of requisite mental capacity by showing that P. H. Williams, at the time of the execution of the assignment, did not understand the nature and effect of such act.

Williston on Contracts, Vol. 1, Sec. 256, p. 500;
Parker v. Marco, 76 Fed. 510;
Richardson v. Travelers Ins. Co., ... Me. ..., 82 Atl. 1005;
Sbarbero v. Miller (N. J. Ch. Ct.), 65 Atl. 472;
Aldrich v. Bailey (N. Y. Ct. App.), 30 N. E. 264.

As stated by Professor Williston, "the question, therefore, should depend, and, according to the great weight of modern authority, does depend, upon whether the

alleged lunatic had **sufficient reason to enable him to understand the nature and effect of the act in dispute.** It is not necessary, however, that a person should have average mental capacity in order to make a valid bargain. **Mere weakness of mind or a condition approaching imbecility is not sufficient** to constitute what the law regards as insanity."

The rule by which the action of a trial court should be guided in determining whether there was sufficient evidence to go to the jury on an issue, as promulgated by the Supreme Court of the United States, is as follows:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed'" (Gunning v. Cooley, 281 U. S. 90, 94).

The burden cannot be sustained merely by arousing a suspicion as to the issue and by leaving the whole question "in the realm of conjecture, possibility or surmise" (Wallace v. Standard Accident Insurance Co. [C. C. A., 6th Cir.], 63 Fed. [2d] 211).

The evidence in this case fairly shows that Williams had been undergoing a change in his physical and mental condition prior to the date on which he signed the instrument in question. That he was a sick man suffering from a physical malady, which a month later resulted in his death, cannot be denied. As a result of financial reverses and sickness he was despondent. On two occasions he had con-

templated suicide, but reason seems to have prevailed with him each time, as he continued to live, and died a natural death. He showed some evidence of absent-mindedness and forgetfulness also in matters such as the counting of numbers and orders given to hired hands. He kept more to himself than formerly, had less to say to acquaintances and exhibited less interest in them. He had become irritable and cross on occasions.

Certainly the foregoing does not constitute any evidence that Williams did not understand the nature and effect of the signing of the instrument whereby he transferred the dividends due him to Lee & Lee. They are merely circumstances that may be taken into consideration in weighing evidence of a more cogent and direct nature as to a lack of requisite mental capacity at the time of execution.

The fact that Williams had about three degrees of fever on the morning of the 18th of September, and that his gums undoubtedly did bleed some during the twenty-four hours following the extraction of the teeth, and preceding the conversation with George Lee and Humlong and the act of signing, shows beyond peradventure that the deceased was in a weakened condition. But such evidence does not show that he was flighty, mentally exhausted, stupefied, unconscious or otherwise incapable of reasoning on the morning of the 18th. Mahatma Gandhi, as pointed out by the trial judge in his charge, is a striking illustration of a man intensely weak physically and yet intensely strong intellectually. Even when Gandhi fasted in jail for days, he had complete command of his mental powers.

The affirmative facts as to what was said and done on the morning of the 18th belie the fanciful claim that Williams was so weakened physically that he did not have command of his mental faculties. To whatever extent he

had bled, it was not sufficient to require before late that night or the early morning of the next day the summoning of medical aid. As already pointed out, he had medical treatment on the night of the 18th, possibly eleven or twelve hours after the execution of the instrument, but, according to Mrs. Williams, such treatment was a hypodermic administered for the purpose of relieving his pain from hiccuping. The uncontradicted testimony of disinterested witnesses shows that he was not weakened to such an extent that he had to stay in bed on the morning of the 18th. He was up, dressed, and he answered the knock at the door. He was not in bed during the conversation which Mrs. Williams would have us believe lasted for two hours. During such time he was in the living room in a chair, and was moving around to some extent. He voluntarily walked to the front gate to bid good-bye to his visitors whom he came to treat as guests. He was capable, therefore, of reasonable physical exertion during the morning, and at and after the time he signed the instrument. He was also capable of reasoning, as is shown by the details of the conversation he carried on. According to Mrs. Williams and Jeff Jordan, Williams said that he was sick and wanted to put off the business conversation, telling his visitors that he would be in San Angelo within a few days and would then attend to the matter. This, in itself, shows the exercise of mental power. He had been approached on a subject that he might be loath to talk about, even if well. His statement shows his engagement in rational, intelligent and connected conversation. The testimony of Humlong and George Lee brings out that Williams talked to them of his herd of cattle, mentioning where he had gotten them and how proud he was of them. He also talked to them about the oats in his bins, and added that he was holding them for a better price. The carrying on of such

conversation by Williams showed that he had power to reason about business matters, and that he used judgment. Williams had first told George Lee that he was peeved at the insurance company, that he did not want to transfer the dividends to Lee & Lee, that he wanted to keep the dividends himself. This showed not only that he was mentally alert and capable of coherent thought, but that he had understanding of the transaction actually involved. In these respects George Lee and Humlong were wholly uncontradicted.

The fact that Mrs. Williams knew that the two strangers called to discuss business with her husband; that her husband was discussing business with them; that she did not enter the room to inform the strangers that her husband was mentally incompetent and unable to discuss business with them; that she did not enter the room to interfere with her husband or to dissuade him from transacting business with the strangers; that she did not enter the room to lend him any assistance in the transaction of business with the strangers, and that she did not testify that at any time she observed anything unusual in the mental conduct of her husband, is proof positive of the fanciful nature of the claim placed before Court and jury in this case.

The testimony of Dr. Nibling, the plaintiff's own witness and Williams' own physician, shows what Williams' physical and mental conditions were two days before and two days after the act of signing. From the 10th to the 16th Dr. Nibling had given Williams a thorough examination, and on the 16th he made a diagnosis. On all of those days Williams "talked sensibly" in the presence of the doctor. The first medical treatment for bleeding of the gums came quite a few hours after the act of signing, either late on the night of the 18th, or about 3 o'clock in the morning of the

19th. There is further evidence that Williams was confined with bleeding and pain on the 19th, 20th and 21st, and that Dr. Nibling went to see him on the 20th and 21st, and that Williams was still "spitting blood and sitting on the edge of the bed, and had a bucket by the side of the bed where he could expectorate." He found Williams "nervous and more or less unstrung" and "holding ice in his mouth, trying to stop the hemorrhage." Even at the end of forty eight hours and seventy two hours after the signing of the instrument, Williams was not so exhausted from the continued bleeding and the ravages of pain and disease in the interval but that he had retained his mental faculties. According to his own physician, Williams still appeared on the 20th and 21st "to be in his right mind," and such witness for the plaintiff noticed on such dates "nothing the matter with his mind."

It is uncontradicted, then, that Williams was in the possession of his mental powers both two days before and also even two days after the signing of the instrument.

There is no testimony from any one of the plaintiff's witnesses that knew Williams—not even Mrs. Williams or Jeff Jordan, the hired hand—to the effect or even indicating that on the 18th, or for that matter on any other day, that Williams was unconscious from physical exhaustion, in a stupor, out of his head or flighty. There was no testimony from any of such witnesses that on the 18th Williams failed to recognize anyone, or that he could not or did not engage in rational, connected conversation.

The evidence of the witnesses who had known Williams, on the other hand, showed affirmatively that on the morning of the 18th, when the instrument was signed, Williams was up, dressed, walking around, capable of reasonable physical exertion, and that he was clear-headed, recognized

those with whom he came in contact and was able to and did reason and carry on a coherent, intelligent conversation about business and other matters.

Certainly, from so much of the evidence, it could not be reasonably inferred that Williams was incapable of understanding the nature and effect of the simple transaction of transferring the dividends earned on his policies to Lee & Lee to pay a debt that he admittedly owed them. Not even a suspicion of legal mental incompetency at the time is raised.

In re Little's Estate (Dist. Ct. of App., Cal.), 189 Pac. 818;
In re Campbell's Estate (Dist. Ct. of App., Cal.), 189 Pac. 812;
In re Shields' Estate (Sup. Ct. of Iowa), 200 N. W. 219;
In re Richardson's Will (Sup. Ct. of Iowa), 202 N. W. 114;
Richardson v. Travelers Ins. Co. (Me.), 82 Atl. 1005;
Sayre v. Trustees of Princeton University (Sup. Ct. of Mo.), 90 S. W. 787;
In re Latlin's Estate (Sup. Ct. of Neb.), 187 N. W. 885;
Johnson v. Talbot (Mass.), 150 N. E. 900;
Taylor v. Creeley (Mass.), 152 N. E. 3.

In the case of In re Little's Estate the evidence submitted by the contestant may be summed up as follows: The testator, a man of some education, at one time cashier in a bank and later a farmer, succeeded well enough to accumulate a comfortable fortune, but he suddenly met with a series and variety of reverses which so shocked his nervous organization as to have worked changes in his physical and mental characteristics. Death claimed his wife after they had only been married a little over a year.

Shortly thereafter the stable located on his farm was destroyed by fire. This misfortune was soon followed by the theft of an automobile owned by him. Following these troubles he appeared to grow discouraged and disappointed, and applied himself more liberally to the consumption of intoxicating liquors than he had ever before been accustomed to indulge in them. He lost flesh and displayed mental peculiarities not theretofore noticed by anyone. According to some of the witnesses he acted irrationally at times. On one occasion when dwelling on his misfortunes he wrung his hands and talked to himself, and on another occasion while under a great nervous strain he exclaimed that all his misfortunes would drive him crazy. On another occasion he complained that an engine used on the farm was out of order and would not perform, but a machinist found it intact in all respects. Some witnesses for the proponents testified that while the testator on occasions acted very peculiarly and like one laboring under a severe nervous and mental strain, he did not appear to be irrational. There was no positive testimony that the testator was under the influence of intoxicating liquor at the time he wrote his will in longhand. The testator committed suicide about a month after he wrote the will. The trial court took the case from the jury and entered an order admitting the will to probate. On appeal such action was upheld on the ground that the contestants' evidence was not sufficient to make out a case to go to the jury on the issue of lack of testamentary capacity.

In the case of In re Campbell's Estate the evidence, as characterized by the Court, showed "that the deceased had been for many years a heavy drinker of intoxicating liquors, and during the latter years of his life drank liquors to excess; that he was a very old man when he made his will, and that he was feeble physically; that on occasions

he was so ill as to be compelled to take to his bed, the cause of such illness, it is to be inferred from the evidence, being the excessive use of alcoholic liquors; that he could not readily remember old acquaintances when their names were mentioned to him or when they met and greeted him * * *; that he often spoke of the Bible and would ask his friends if they thought he was saved, and would cry very often." The action of the trial court in taking the case from the jury and in awarding judgment against the contestants of the will was upheld on the ground that the evidence was insufficient to require the submission to the jury of the issue of testamentary capacity.

In the case of In re Shields' Estate the testator was a farmer, dying at the age of 71 and leaving surviving him a daughter and a son. The will was executed about two and one-half months prior to his death. There was evidence that the testator had had a spell of sickness and had been confined in a hospital, and that he had arteriosclerosis. Other evidence was to the effect that the testator was at times irritable, childish in some ways and forgetful. A physician called by the contestant testified that the testator talked rationally and sensibly, and that he did not notice anything out of the normal in his mental state when he examined him some time between the execution of the will and the testator's death three months later. The trial court directed a verdict for the proponents of the will and the contestants appealed, but the judgment in favor of the proponents was upheld, the Court saying:

> "Time and again this Court has declared that mere old age or some deterioration in physical or mental powers, or peevishness, childishness and eccentricities are not alone sufficient to carry to the jury the question of mental unsoundness on the part of a testator."

In the case of In re Richardson's Will the testatrix, at the age of 78, executed a will while she was in bed sick with pneumonia, of which she died four days later. The will was executed at about 7 o'clock at night, and on the morning of the same day a physician was called and found her suffering a great deal with pain in her chest, labored respiration and some temperature. He saw her again in the afternoon, found the trouble localized in the right side of the chest and diagnosed it as pneumonia. He found an irregular heart action, which he designated as a partial heart block. He testified that pneumonia caused poisons in the system until they affected mentality, and that heart block impairs the circulation through the brain and the entire system and could affect the mentality to a certain degree. Within a few minutes after the will was executed the same physician saw the testatrix again. He testified that the testatrix would have to be asked a question two or three times, that he did not know whether she was in a state of losing her reason entirely. He added: "I would say, under those circumstances, she was of unsound mind. She was in a certain stupor or mental apathy." Two daughters who saw the testatrix the next morning said that their mother's eyes were glassy, that she was weak and pale and she breathed hard, and that she acted as though she were really too sick to know who they were, or what was going on in the room. The trial court submitted the case to the jury, and the jury returned a verdict for the contestant and found that the testatrix did not possess testamentary capacity. But, on appeal, it was held that the evidence was insufficient to sustain the finding that the testatrix was of unsound mind at the time the will was executed. The Court said:

> "She was physically, not mentally, ill. Any mental disturbance or impairment from which she suffered

was the result of her physical condition. It is not doubted that, as a result of physical ailments, a person may, in the progress of the disease or by reason of weakness, become mentally incompetent, or that this may occur in the case of one suffering from the ills that afflicted the testatrix. **But the evidence wholly fails to show that such a stage had been reached in the course of her illness at the time the will was executed.** She was suffering and was weak; but the only indication of mental disturbance noticed by Dr. Hoefer was that it was necessary at times to repeat questions to her. His statement that she was in a sense of unsound mind clearly had reference to that situation as being a departure from the normal."

The other cases cited are of similar import.

If it be true then that the evidence adduced, exclusive of the testimony of the alienist, Dr. White, was insufficient to carry the case to the jury on any charge as to the issue of lack of mental competency, did the expert opinion of the alienist, who, without ever having seen Williams, gave an answer to a hypothetical question based upon a part of such evidence, and omitting much undisputed material evidence of an adverse nature, require that the case go to the jury on a charge with reference to such issue? The solution of the question depends in part upon the nature of such testimony, which is analyzed by Thayer in the following language:

"They 'judge' the phenomena, the appearances or facts which are presented to them, and testify to that which in truth these signify or really are; they estimate qualities and values. We say that they testify to opinion. In truth, they are **'judging'** something and testify to their conclusion upon a matter of fact * * *; they are simply to aid the final judges of fact,

and not to bind them" (Thayer, "A Preliminary Treatise on Evidence at the Common Law," p. 196).

Time and again, where the alienist has not seen the person whose mental capacity is in issue, and where he answers only a hypothetical question which a court has felt did not, as a matter of law, contain any reasonable basis for the expression of an opinion against mental competency, or which did not contain substantially all of the essential facts proven at the trial by the undisputed evidence, the Court has not hesitated to take the case from the jury notwithstanding such expert opinion.

In Re Little's Estate, Dt. Ct. App. Cal., 189 Pac. 818;
In Re Richardson's Will, Iowa, 202 N. W. 114;
Sayre v. Trustees of Princeton University, Mo., 90 S. W. 787;
Taylor v. Creeley, Mass., 152 N. E. 3.

With reference to the case of In Re Little's Estate we have already shown the essential facts testified to by witnesses who had known and observed the testator. They bear in many respects a striking similarity to the facts relied upon by the plaintiff in this case. In addition, the contestant produced an alienist who was asked a hypothetical question embodying the facts that we have detailed, and he said that in his opinion, at the time the will was written, the testator was insane. Notwithstanding such opinion the Court refused to let the case go to the jury on the issue of mental competency, and such action was upheld on appeal. With reference to the expert testimony the Court said:

"* * * but as to this character of testimony the Supreme Court, in Estate of Dolbeer, 149 Cal. 227, 243, 86 Pac. 695, 702 (9 Ann. Cas. 795), has justly declared: 'The witnesses were skilled alienists, it may be conceded, but the evidence thus adduced of one who has

> never seen the person or who bases his opinion upon the facts given in a hypothetical question is evidence the weakest and most unsatisfactory.'"

In the case of In Re Richardson's Will, likewise a case where the appellate court considered that the evidence was insufficient to go to the jury, notwithstanding the opinions of expert witnesses given in answer to a hypothetical question, the Court characterized the testimony of expert witnesses so given as "a class of testimony generally recognized as weak" and "in this case of little or no value in determining the mental condition of the testatrix at the time the will was executed."

In the case of Sayre v. Trustees of Princeton University, wherein the trial court let the case go to the jury and the jury returned a verdict that the paper writing propounded was not the last will and testament of the testator because of lack of testamentary capacity, and wherein the Appellate Court reversed the case with directions to enter a judgment admitting the will to probate and holding that the evidence was wholly insufficient to go to the jury on any question of mental incompetency, the Court said, with reference to the testimony of several alienists given in answer to a long hypothetical question:

> "We are not bound to accept an opinion based upon facts which the law will not, and does not, recognize as showing a want of capacity to make a will."

In Taylor v. Creeley, the Appellate Court was of the opinion that all of the evidence, notwithstanding the adverse testimony of experts, was insufficient to go to the jury on any issue of mental incompetency.

We have already shown that in our case the cross-examination brought out that the alienist, in giving his answer

to the long hypothetical question propounded to him, went outside the facts stated to him, and from his own imperfect memory of what he had heard in the court room from witnesses, assumed as the principal fact upon which his opinion was based that Williams, prior to the act of signing, had been bleeding "for **two** or **three** days, something like that, and rather extensively." His assumption was unfounded, because of the uncontradicted evidence that, prior to the act of signing, Williams' gums had been bleeding approximately twenty-four hours. It is implied that the alienist's opinion was based upon assumption of such complete physical exhaustion as to make reasonable an inference of mental collapse. Such assumption and such inference are both refuted by facts not put to the witness in the question propounded—facts that at, and for at least an hour or so prior to the act of signing, Williams was up, dressed and responded to the knock at the door when George Lee and Humlong arrived, and that while they were there he engaged in intelligent, coherent conversation about business and other matters, and that when Lee and Humlong left he voluntarily walked with them to the front gate and engaged in more rational conversation—facts which show conclusively that at the time of signing Williams was not only capable of reasonable physical exertion, but also in possession of his mental faculties and power of reasoning.

We submit that there was no evidence from which it may be reasonably inferred that Williams appeared to be **mentally** ill on the morning of September the 18th, much less that he was so mentally ill on such morning that he could not have understood the transaction of assigning the dividends to Lee & Lee.

We submit, therefore, that none of the evidence was suf-

ficient to take the case to the jury on the issue of lack of mental competency. This being so; it follows that the assignment of the dividend declared on the policy that lapsed was valid, that pursuant to such assignment, the dividend was paid to the insured (or his order) in cash, which was one of the options afforded by the policy, and that the dividend was thus validly applied, and cannot be used again for any other purpose. It follows, for such reason alone, if for no other, the trial court erred in not instructing the jury, in accordance with the defendant's request, to return a verdict for the defendant.

In the plaintiff's pleadings there were allegations of fraud, based on the theory that unfair advantage of Williams was taken in the transaction with George Lee and Humlong. No evidence was introduced by the plaintiff on such issue. The evidence heretofore narrated shows conclusively that the accusation was wholly unfounded. The Court did not charge the jury on such issue, and the plaintiff did not request any charge thereon. We take it that such claim has been wholly abandoned by the plaintiff's attorneys.

SECOND SPECIFICATION OF ERROR.

The Court erred in admitting the evidence on behalf of the plaintiff, as follows:

> Question of the plaintiff's attorney propounded to the plaintiff's witness, Dr. F. S. White:
>
> "Now, doctor, please answer the question that I am about to propound to you, basing your answer thereto upon the following assumed state of facts: For several years prior to the year 1931, P. H. Williams was engaged upon a large scale in the oil business, including the drilling of wells. He was active and energetic;

he was, generally speaking, of a sociable disposition, and even temperament. Prior to the year 1931 he suffered heavy financial losses, and became despondent, and on at least one occasion he became so morose as to talk of suicide. In the spring and early summer of 1931 there was noticeable to some of those coming in contact with him some lapse or loss of memory, relating to recent events. During that portion of the year 1931, prior to August 16, 1931, which is the date of the accident that will be hereinafter mentioned, he managed his farm in Irion County, Texas. He at times did work, as driving a tractor, handling cattle and general work about the farm. Prior to August 16, 1931, he gave some signs of occasional indisposition, apparent to his wife, but was able to, and did work, involving physical labor occasionally, as hereinabove indicated. On or about August 16, 1931, while branding a bull yearling, he was kicked in the abdomen by that yearling, with such force as to knock him down. Thereafter, he did not do any work on the farm involving any material or appreciable physical exertion. He did give directions to the farm hands as to the work, but he was not able to bear in his memory from one day to another the directions so given, this being noticeable on a number of occasions. After the said accident he complained of discomfort, and at times pain in the abdomen. When walking he stooped, and at times was observed holding his hands to his abdomen and side. He became short of breath; at any appreciable exertion he would gasp for breath. Hiccups and headaches developed shortly after the accident and continued intermittently until the time of his death. The hiccups continued to a few days before his death, when he suffered a hemorrhage, after which hemorrhage he did not have hiccups. Both shortly prior to the accident and after the accident he was observed, on several occasions, sitting in his car, stooped and bowed over the steering wheel, with his head downcast, being and

remaining in such position for periods of from thirty to forty-five minutes, manifesting on said occasions no interest whatsoever in his surroundings. In the latter part of August and early part of September, 1931, he went through clinical examinations, including laboratory urinalysis and X rays, at the San Angelo Medical and Surgical Clinics. Abnormalities were evidenced, by casts, and some sugar was observed in the urinalysis, but not so as to definitely indicate the cause of his trouble. No positive or definite diagnosis was made by the physicians at the clinic, but the X-rays and other findings suggested to the examining physicians and indicated to them that he had a serious disorder, involving the liver and perhaps the gall bladder—in their opinion either a condition of malignancy or cirrhosis. No condition of ascites or dropsy was noted during the period of said examinations, which extended until about the middle of September, 1931. X-rays made of the teeth during said examination disclosed pus pockets in several teeth, and on September 17, 1931, in the morning of said day, all of his teeth, some fourteen in number, were extracted. A local anaesthetic, with the dental blocking technique, was used. The operating dentist noticed that several teeth had pus pockets at the roots, and further noted a condition of ankylosis, in bone tissue, and a deterioration of bone tissue. In the afternoon of said day of September 17, 1931, the said P. H. Williams went from San Angelo, where the dental operation had been performed, to his ranch or farm in Irion County, Texas, a distance of some twenty miles, being taken there in a car. Upon his arrival there he went to bed, and spent a restless and practically sleepless night, his gums bleeding all during the night, and practically throughout the night, his condition of restlessness being such that his groaning was noticeable to a farm hand sleeping in the next room to the room adjoining the one in which Mr. Williams was sleeping—noticeable at times

during the night. On the morning of September 18, 1931, the said P. H. Williams did not eat any breakfast. He appeared to be to those at the place, and so stated to them, weak and sick. His gums continued to bleed intermittently during the early morning of said date of September 18th. During the preceding night he had had fever. He had some fever during the early morning of September 18th. He had fever in the afternoon of September 18th, a little higher than it had been early in the morning, the fever in the morning being 2 degrees, or thereabouts, above normal, and in the afternoon being something like 2 degrees above that in the morning. He did not eat any dinner. He was in bed most of the early part of the morning of September 18th, and sat up during part of the morning of September 18th, in a chair in the room joining the bedroom. In the afternoon of September 18th he grew weaker. He had been given aspirin while at his house to relieve his suffering and discomfort. In the afternoon or early in the evening or night of September 18th he became—to those surrounding him, to his wife—so weak and his gums bleeding so much that she returned with him to San Angelo, to the Central Hotel, arriving there in the night of September 18th. He remained in the Central Hotel from September 18th to the date of his death. From the night of September 18th until the date of his death—his death occurring on October 15, 1931—he was not, during all of that period, in bed; part of the time he was in bed and part of the time he would sit upon the bed. At times between September 18th and the date of his death—for a few days after September 18th—his gums bled so much he had hemorrhages, and physicians had to be called and morphine administered. On the night of September 18th he was again restless and sleepless. These hiccups were almost constant, with few intermittent periods between September 18, 1931, and the date of the hemorrhage, which preceded his death by

only a few days. He complained during this period, between September 18th and the date of his death, of discomfort and pain in his abdomen, shortness of breath, being troubled so much that he had to be propped up and had to sit up in bed with a pillow behind him instead of lying down. Now, he was able to go to see a doctor on or about September 30, 1931, able to walk to his office, to the doctor's office, that doctor being Dr. Marberry. Dr. Marberry found, upon examination, when P. H. Williams first came to him in the latter part of September or at the last of September, a marked condition of ascites or dropsy, and found by manipulation and examination that the liver was abnormally small. His diagnosis was cirrhosis of the liver. The prognosis was very unfavorable, he stating that he saw nothing could be done to save him. The only thing that he undertook to do was to try to alleviate, to some extent, the discomfort produced by this dropsy—alleviating that by injecting a needle in the abdomen and drawing off the fluid on several occasions, the amount of fluid running as high as two gallons. Dr. Marberry treated him once, perhaps twice, at the office. He went to see Mr. Williams at the hotel also, and performed this operation to alleviate his discomfort from the ascites. He said that no appreciable relief was obtained. Those who observed P. H. Williams noticed changes in him, physically and otherwise, and some noticed them at one time and some at another time, some placing the date early in the year 1931, some in the summer of 1931, some before, and some after, the date of the accident in August, 1931. Dr. Nibling, one of the physicians in the clinic, noted that Williams was suffering from a serious disorder—such a disorder as to result in a toxic condition calculated and likely to influence or affect his nervous system and his mental powers, but Dr. Nibling stated that he did not observe unsoundness of mind. Those who were in contact with P. H. Williams and closely asso-

cinted with him observed marked change, both as to his physical condition and as to his mental condition, as hereinabove outlined, and as to his personality, and as to his characteristics, and these changes had been observed and noted prior to September 18, 1931.

Now, doctor, basing your answer upon said assumed state of facts, please state whether or not in your opinion P. H. Williams, on September 18, 1931, had the mental power and capacity to weigh and understand and consider the nature and effect of a business transaction, assuming that all of those facts are true.

Answer: I will answer that question, assuming all of these statements are true, and assuming that, my opinion would be that he was not in a condition to know the nature and effect of the signing of the paper."

for that the sum total of the evidence introduced on the basis of which the hypothesis was stated was insufficient to form any basis for the framing of a hypothetical question to an alienist as to the mental capacity of P. H. Williams; for that the question, taken as a whole, was too vague and indefinite in detail to form any basis for the rendering of an opinion by an alienist; for that, taken as a whole, there was no basis in the testimony for the assumption of facts stated to the witness; for that the assumption in such question that Williams had suffered a loss or lapse of memory as to recent events was objectionable on the ground that there was no specification of the things not remembered or of the surrounding circumstances or of the dates of such matters; for that the assumptions in such question, as to some signs of occasional indisposition apparent to the wife as to material or appreciable physical exertion, followed at some vague and indefinite time by a lack of material or appreciable physical exertion on the part of said Williams; as to Williams not being able to bear in his memory, from

one day to another, directions given by him to people on his farm; as to Williams, at times, holding his hands to his side; as to Williams, on several occasions, being observed sitting in his car, drooped and downcast; as to Williams, after going to San Angelo to consult doctors, being part of the time in bed and part of the time not; as to Williams suffering a shortening of breath so much that at times he had to sit up and be propped up, were too vague and indefinite to form any basis for the expression of opinion by an alienist as to Williams' mental capacity; for that there was no basis in the testimony for the assumption of facts stated in the question with reference to Williams not being able to bear in his memory from one day to another directions that he had given; for that the assumption in such question with reference to certain witnesses having noticed a change in Williams' condition or a marked change in condition, mentally and physically, did not inform the alienist as to what the changes were; and for that, in other respects too numerous to mention, the question was too vague and indefinite; and for that, in other respects too numerous to mention, there was no basis in the testimony for the facts assumed.

STATEMENT AND ARGUMENT.

The foregoing specification contains a full statement of the facts assumed in the hypothetical question propounded to the alienist and a full statement of the objections made by counsel to the question propounded, and such statement of facts and objections will not be repeated here. The statement contained under the third proposition relating to the first specification of error is applicable and will not be repeated. No additional statement is needed.

The principal objection made to the question propounded

was that there was no basis in the testimony for the assumption of the facts stated to the witness.

There were several more or less minor discrepancies between the facts stated by the plaintiff's attorney and the record on which they were supposed to be based. For example, the question states that Williams was "not able to bear in his memory from one day to another the directions so given." The reference is to directions given to farm hands after the injury from the bull in the middle of August, 1931. Only two farm hands testified, to wit, Jeff Jordan and Jim Mabry. Each testified to some forgetfulness on Williams' part after such injury, but neither one characterized it as a daily occurrence. Another overstatement of the case contained in the question is with reference to the occasions when Williams sat in his car, stooped and bowed over the steering wheel. It was stated that he would remain in such position "for periods of from thirty to forty-five minutes" and that he did so "on several occasions." Only one witness, to wit, A. E. Henderson, testified to one, and only one, occasion when Williams remained in such position for more than one-half hour, and the only other witness to testify to any such incident, to wit, Jim Mabry, stated that they lasted from ten to thirty minutes (Tr., pp. 128, 123). Again the question erroneously states, "on the morning of September 18, 1931, the said P. H. Williams did not eat any breakfast. He appeared to be to those at the place, and *so stated to them, weak and sick.* His gums continued to bleed intermittently during the early morning of said date of September 18." Mrs. Williams was the only witness to testify as to what took place during the early morning, and her only testimony as to what happened then is as follows:

"I took his temperature the next morning, between

7 and 8, and it was still about what it had been, between 100 and 102.

Mr. Williams wouldn't eat anything the next morning; he didn't even sit at the table. He did not get up when I got up to fix breakfast for Mr. Jordan. Later he slipped on his clothes and went out to the toilet in the back yard, as we had no conveniences in the house. He did not tie his shoes; he just slipped on his shirt and trousers and shoes. He took some more aspirin; he was just living on aspirins. He left his clothes on" (Tr., p. 105).

So the statement of the question to the effect that Williams, in the early morning of the 18th, was, and he so stated to them, weak, is not borne out by the testimony. Another exaggeration is contained in the question in the following statement:

"In the afternoon of said date of September 17, 1931, the said P. H. Williams went from San Angelo * * * to his ranch or farm in Irion County, Texas, a distance of some twenty miles, **being taken** there in a car" (Tr., p. 206).

There is no evidence that Williams did not drive himself out to the ranch. The only testimony in the record is from Mrs. Williams, and is as follows:

"About sundown we decided to go out to the farm. He thought he might rest better out there. We got there about dark, on the night of September 17" (Tr., p. 105).

A few other minor exaggerations or unsupported statements could be mentioned. Perhaps such exaggerated statements or misstatements would not be sufficient in and of themselves to require a reversal on account of the Court's admission of the doctor's answer, over the objection of the defendant's attorney, if it were not for the

further fact that such question contains a misstatement which we believe should be regarded as material and highly prejudicial, and, therefore, so important an error as to require a reversal.

The misstatement now referred to is as follows:

> "In the afternoon or early in the evening or night of September 18th he became—to those surrounding him, to his wife—*so weak and his gums bleeding so much* that she returned with him to San Angelo, to the Central Hotel, arriving there on the night of September 18th" (Tr., p. 207).

Mrs. Williams was the only one to testify as to what happened on the afternoon of the 18th, and her whole testimony on said subject is as follows:

> "I helped him to the bed in his room, where he sat down on the bed and took some aspirins, and I slipped his shoes off and straightened him out on the bed. I put a wet towel on his forehead. I took his temperature, and it was between 102 and 103, and that scared me, and I telephoned to my son in San Angelo to bring some ice out and to take us back to the doctor. My son come. We waited until it got cooler, and then we took Mr. Williams back to town, after sundown" (Tr., p. 107).

It is seen from such quotation that Mrs. Williams decided to go back to town and summoned her son for such purpose solely because she was scared after taking Williams' temperature and finding that it was between 102 and 103. She made no reference to his condition of weakness or to his bleeding gums as being any cause for the decision to return to San Angelo.

Inasmuch as this unsupported statement related to Williams' physical condition only a very few hours after

the signing of the instrument transferring the dividends, and inasmuch as the doctor testified on cross-examination that his opinion was based so largely upon the weakened physical condition that he assumed to exist on the 18th of September, the unsupported statement should be deemed a material error, and should have required the exclusion of the answer to the question so framed. The admission of the answer over the defendant's objection, we submit, now requires a reversal.

Another principal objection made to the question propounded to Dr. White was that the sum total of the evidence introduced, forming the basis for the framing of the hypothetical question, was insufficient for such purpose, no case being made out by such evidence from which it might be reasonably inferred that at the time the instrument was signed by Williams he was incapable of understanding the nature and effect of the transaction. That such evidence did not form any reasonable basis for such inference has already been pointed out in argument under the third proposition under the first assignment of error.

Other objections contained in the foregoing specification of error are well founded and lend accumulated weight to our contention that the admission of the answer of Dr. White to the hypothetical question, over the objections made in behalf of the defendant, constitutes an error requiring reversal.

THIRD SPECIFICATION OF ERROR.

The Court erred in giving to the jury the instructions indicated by the underscoring (here shown in italics) in the following quotation quoted totidem verbis from his charge to the jury:

"The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * *If she has done that, then she is entitled to a verdict.*

* * * * * * *

"There is also an option one, and an option two. Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.'

* * * * * * *

"The Court holds that, under those two options that I have read, that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now, think with me carefully—was that done in this case? *Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff.* If you find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was, in truth and in fact, an instrument given for the transfer of that particular dividend to Lee & Lee on the note which Mr. Williams owed Lee & Lee for the premium that was paid by them on the year before. But no one may make such a contract as that, or any contract, for that matter, unless he is in his right mind. If he was not in his right mind at that time, or, if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee & Lee, and you will determine that particular

question; and then you will determine the further question as to whether or not, under all of the circumstances of this case, he ordered, and was entitled to have that dividend purchase extended insurance.

* * * * * * *

"If you find that Mr. Williams, at the date of executing this order to Lee & Lee to collect these dividends, which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee & Lee, and that he knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff,"

for that such charge expressly or impliedly indicates, but erroneously indicates, that the insured had the right, under the policy, to the use of the 1931 dividend for the purchase of extended insurance, and for that the same is contrary to the evidence and to the valid provisions of the policy which established that if the policy should lapse for the nonpayment of the premium, as it did lapse for the nonpayment of the January 10, 1931, premium, that the dividend then due should be paid in cash.

STATEMENT AND ARGUMENT.

The foregoing specification shows, in substance, the entire charge of the Court relative to what the jury would have to believe in order to return a verdict for the plaintiff. The statement under the first proposition under the first specification of error is applicable. Such statement sets forth the terms of the policy, which are also quoted in full in the transcript at pages 83 to 90.

The trial court, in substance, charged the jury that the 1931 dividend had become a dividend left with the company for the purpose of accumulating interest, but was

usable for the purchase of extended insurance. The Court further charged the jury, in substance, that if they found that there had not been a valid payment of the dividend to the insured in cash, and if the dividend was still due, then they should find that it had been used to purchase extended insurance, and they should return a verdict for the plaintiff.

The Court evidently read article 11 of the policy providing for several options as to the disposition of a dividend declared on a policy, and among such options found the option that "dividends may be * * * left to accumulate, with interest at 3 per cent, increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy, subject to withdrawal at any time."

Then the Court evidently read article 17 and found that the surrender value of the policy (less deductions on account of indebtedness on the policy) may be "applied to the extension of this policy as participating term insurance from the date to which premiums had been paid without any further payment (Table 1). Accumulations of dividends at interest may be applied to increase the term of extension." The option provided for in article 17, with reference to the purchase of extended insurance, is, by the terms of article 16, made the automatic disposition of the policy value "if on failure to pay a premium no option is exercised."

The Court concluded that under such options the 1931 dividend had been left with the insurance company to accumulate at interest, and that, therefore, there were "accumulations of dividends at interest" available to increase the term of extension automatically purchasable with the policy value. The policy value, after deduction

of the policy indebtedness, was only $11.12, and such value automatically applied, upon lapse of the policy, was not sufficient to keep the insurance in force through the days of grace as extended term insurance commencing June 10, 1931, the date to which the premiums had been paid. But the amount of the 1931 dividend was $74.80, and such sum, if added to $11.12, was sufficient to keep the extended term insurance in force beyond the date of the death of the insured.

The Court reasoned that if the 1931 dividend, which he thought had been left to accumulate at interest, had not been subsequently and validly paid in cash to the insured, or his order, then the dividend was still an accumulation, and that it had been automatically applied either as a part of or as an addition to the policy value available for the purchase of extended insurance.

The Court, therefore, charged the jury: "The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * If she has done that then she is entitled to a verdict." And again: "If you find that he [Williams] did make such an order [for the transfer of the 1931 dividend to Lee and Lee], and that he did not know what he was doing, then you should find for the plaintiff."

The trouble with the Court's reasoning is that it is based on the false premise that there were "accumulations of dividends at interest," and that the 1931 dividend had become such "accumulations" available as "accumulations" for the purchase of extended insurance. We have heretofore pointed out that the 1931 dividend became usable

on June 10, 1931, and that any term of extension began on June 10, 1931. There was no interval, therefore, during which the 1931 dividend could have been allowed to earn any interest. We have pointed out that under the terms of the policy a dividend can be left to accumulate with interest "until the maturity of the policy," only when left while the policy is to be continued and is continued in force. We have pointed out that the option to leave a dividend to accumulate with interest is, under the terms of the policy, one of several options that, with respect to any given dividend, may be exercised only during the days of grace and not subsequently; that there was no such exercise of any such option by the insured within the days of grace and that upon the expiration of the days of grace and the lapse of the policy, the dividend automatically became usable only in cash and not otherwise. Our argument in support of such points has been made under the first proposition under the first assignment, and will not be repeated here.

On account of the error in the Court's charge with reference to the availability of the 1931 dividend as an accumulation of dividends at interest available for the purchase of extended insurance, we submit that the judgment of the trial court should be reversed.

FOURTH SPECIFICATION OF ERROR.

The Court erred in giving to the jury the instructions indicated by the underscoring (here shown in italics) in the following quotation, quoted totidem verbis from his charge to the jury:

> "The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it as hereafter shown, the

amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * If she has done that then she is entitled to a verdict.

"There is also an option one and an option two. Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.'

"The Court holds that under those two options that I have read that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now, think with me carefully—was that done in this case? *Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff.* If you find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was in truth and in fact an instrument given for the transfer of that particular dividend to Lee and Lee on the note which Mr. Williams owed Lee and Lee for the premium that was paid by them on the year before. But, no one may make such a contract as that, or any contract for that matter, unless he is in his right mind. *If he was not in his right mind at that time, or, if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee and Lee, and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case, he ordered, and was entitled to have, that dividend purchase extended insurance.*

* * * * * * *

"If you find that Mr. Williams, at the date of exe-

> cuting this order to Lee and Lee to collect these dividends, which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee and Lee, and that he knew what he was doing, then you should find for the defendant. If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff,"

for that such portion of the charge expressly or impliedly indicates, but erroneously indicates, that the insured did exercise any right in any way to use dividends for the purchase of extended insurance, and for that there was no evidence of any such exercise or application within the time specified in the policy therefor, or in fact at all.

STATEMENT AND ARGUMENT.

The statement made under the first proposition under the first specification of error is applicable. The only evidence in the entire record as to any expression by the policyholder variant from the assignment of the dividend to Lee & Lee is contained in a letter from Lee & Lee to the defendant. Such letter was not written until September 14, 1932. It recites that "about the 1st of September" the defendant's agent at San Angelo saw Williams and "Williams told him he was not going to sign the surrender vouchers with any part of it made payable to Lee & Lee, that it was a crooked deal and that *he was going to have every nickel applied towards paying these policies as far as it would carry them*" (Tr., p. 97).

Such hearsay expression did not occur until about September 1st. There is no evidence of any attempt whatever to select or exercise any option, and no evidence of any expression by the policyholder, within the thirty-one days of grace.

Our argument that, under the policy provisions, such options, if exercisable at all, had to be exercised within the days of grace, and that at the expiration of the days of grace, upon lapse of the policy, the dividend due June 10, 1931, automatically became payable in cash, and was not otherwise usable, is set forth under the first proposition under the first specification of error. It is unnecessary to repeat such argument here.

FIFTH SPECIFICATION OF ERROR.

The Court erred in giving to the jury the instructions indicated by the underscoring (here shown in italics) in the following quotation, quoted totidem verbis from his charge to the jury:

> "The plaintiff must establish, in order to entitle her to recovery, the issuance of the policy, the obligation of the defendant to pay it, as hereafter shown, the amount of money for a dividend that was due the deceased, and his insanity, by a preponderance of the testimony. * * * *If she has done that, then she is entitled to a verdict.*
>
> * * * * * * *
>
> "There is also an option one and an option two. Option one reading, in part, as follows, 'accumulations of dividends at interest may be applied to increase the term of extension of insurance.' Option two, 'accumulation of dividends at interest may be applied to purchase additional paid-up insurance.'
>
> * * * * * * *
>
> "The Court holds that under those two options that I have read, that the earned and unused dividend at that time may be used and advantaged by the insured for the purchase of such extended insurance.

"Now, think with me carefully—was that done in this case? Did the insured use his dividends to buy this extended insurance? If you find that he did, then you will find for the plaintiff. If you find that he did not, then you will find for the defendant.

"You must, of course, conclude that he did not, because there was, in truth and in fact, an instrument given for the transfer of that particular dividend to Lee & Lee on the note which Mr. Williams owed Lee & Lee for the premium that was paid by them on the year before. But no one may make such a contract as that, or any contract for that matter, unless he is in his right mind. *If he was not in his right mind at that time, or if he did not have mental capacity to execute an agreement of that sort, then he may be said not to have ordered the payment of those dividends to Lee & Lee,* and you will determine that particular question; and then you will determine the further question as to whether or not, under all of the circumstances of this case he ordered, and was entitled to have that dividend purchase extended insurance.

* * * * * * *

"If you find that Mr. Williams, at the date of executing this order to Lee & Lee to collect these dividends, which were due him, Williams, and thereby apply them upon the debt which Williams owed to Lee & Lee, and that he knew what he was doing, then you should find for the defendant. *If you find that he did make such an order, and that he did not know what he was doing, then you should find for the plaintiff.*"

for that the portion of the charge quoted submits to the jury an issue of the insured's mental incompetency and to find for the plaintiff if it found the insured mentally incompetent, and for that the evidence was insufficient to justify the submission of such issue to the jury.

STATEMENT AND ARGUMENT.

The statement and argument made under the second proposition under the first assignment of error is applicable. We submit that it sustains the point that the evidence was insufficient to justify the submission to the jury of any issue as to the insured's lack of mental competency at the time he transferred the dividends to Lee & Lee. We submit that the Court erred in charging the jury upon such issue and in permitting the jury to return a verdict for the plaintiff if they found that the insured did not know what he was doing when he signed the order transferring the dividends.

SIXTH AND SEVENTH SPECIFICATIONS OF ERROR.

Sixth. The Court erred in giving to the jury the instruction indicated by the underscoring (here shown in italics) in the following quotation totidem verbis from his charge.

> "'Write your verdict, please, upon a form which the clerk will give you, saying: 'We, the jury, find for the plaintiff in the sum of $9,101.12, plus $910.00 *attorneys' fees, plus 12 per cent penalty,* plus 6 per cent interest from January 1, 1932.'"

for that the state statute with reference to attorneys' fees and penalties is unconstitutional, and for that the provisions of such statute with reference to the recovery of attorneys' fees or penalties were not complied with in this case.

Seventh. The Court erred in overruling the special exception filed by the defendant in his answer to the petition filed in this case with reference to the recovery of attorneys' fees and penalties.

FIRST PROPOSITION.

Article 4736 of the Revised Statutes of Texas, 1925, neither in its original form nor as amended by the Acts of 1931, Forty-second Legislature, page 135, Chapter 91, Section 1, is constitutional, for that such statute denies the defendant the equal protection of the laws and deprives the defendant of its property without due process of law, in violation of Amendment 14, Section 1 of the Constitution of the United States.

STATEMENT.

The seventh specification of error raises the question of the constitutionality of the statute with reference to penalties and attorneys' fees by a special exception, contained in the defendant's first amended original answer (Tr., p. 35) to the plaintiff's claim in her first amended original petition for the recovery of statutory penalties and attorneys' fees (Tr., pp. 17-34).

The sixth specification of error raises the same question as to the constitutionality of the statute by embodying the objections made to the Court's charge, which permitted the jury to return a verdict for the plaintiff and to assess damages, including statutory penalties and attorneys' fees. Therefore, the two specifications of error may be conveniently grouped for purposes of argument as to the constitutionality of the statute.

The Court overruled the special demurrer, and the defendant duly excepted (Tr., p. 73). The Court charged the jury, if it found for the plaintiff, to add to its verdict an assessment of $910.00 attorneys' fees (the amount agreed upon as reasonable if recoverable), and 12 per cent of the primary recovery as a penalty (Tr., pp. 187, 188, 192). To such verdict the defendant duly excepted.

for the reasons stated in the sixth specification of error (Tr., p. 188). The judgment against the defendant includes $910.00 as attorneys' fees and the 12 per cent penalty (Tr., pp. 73, 74).

The plaintiff alleged, and at the trial it was agreed, that the defendant, prior to the application for the policy and prior to the issuance thereof, had secured a permit to do business in the State of Texas and a license to do business in such state, upon its application made therefor, as a life insurance (legal reserve) company operating under the statutes of the State of Texas, pertaining to such kind and character of insurance companies, and at all times thereafter so operated under said permit and license, and that it was at all times a private corporation, incorporated under the laws of the State of Ohio (Tr., p. 82).

ARGUMENT.

The state statute, as amended, reads:

> "*In all cases where a loss occurs and the life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent damages on the amount of such loss, together with reasonable attorney fees for the prosecution and collection of such loss.* Such attorney fee shall be taxed as a part of the costs in the case. The Court in fixing such fees shall take into consideration all benefits to the insured incident to the prosecution of the suit, accrued and to accrue on account of such policy."

The italicized portion shows the statutory provision as

it existed in the Revised Statutes of 1925. The portion not italicized was added by the Amendment of 1931, and is wholly immaterial to the discussion of the constitutionality of the statute.

The defendant has defended the suit brought on the ground that under the valid provisions of the policy there was no extended insurance in force at the date of the death of the insured, P. H. Williams. No Court can say that this defense is vexatious or that it is not made in good faith.

The defendant has defended the suit also on the ground that the dividend, having been paid to the insured or his order, was under no circumstances available for the purchase of extended insurance. The plaintiff sought to avoid the effect of such a payment by pleading that the insured was non compos mentis at the time that he consented to the payment of the dividend in question.

The first intimation the defendant had that there was any claim that the dividend had not been validly paid in cash, or that there was any claim that the insured was non compos mentis, came from the defendant's attorneys in a letter dated March 17, 1932, which was some time after the suit was filed (Tr., p. 160). The suit was filed February 29, 1932 (Tr., p. 8). The evidence shows that the thinnest sort of evidence possible was adduced by the plaintiff at the trial on the issue of the insured's mental incompetency; and the insured's own physician, a witness for the plaintiff, admitted on cross-examination that both two days before and two days after the act of the insured whereby the insured transferred the dividend to Lee & Lee and caused the defendant to pay the same in cash to Lee & Lee, he could find nothing the matter with the insured's mind, and that the insured always talked

sensibly in his presence. Certainly under such circumstances it cannot be said that the defendant was unreasonable in permitting the case to go to suit. If the plaintiff had to resort to an imported alienist who never saw the insured to find the sole person to testify that in his opinion the insured was mentally incompetent on the morning on which the insured signed the order transferring the dividend, can it be said that there was any vexatious delay on the part of the defendant because it did not admit liability in advance of a judicial finding as to the insured's state of mind on the date of the transfer?

Our state courts have construed our Texas statute, however, as imposing against life, health and accident insurance companies the burden of incurring an absolute liability for attorneys' fees and penalties (in case there is a loss under the policy and payment is not made pursuant to demand), regardless of whether or not any such company has reasonable grounds for believing that it is not liable, regardless of whether or not the issue as to its liability is one upon which there may be an honest difference of opinion, and regardless of whether or not there is any vexatious delay involved in the company's refusal to recognize its liability.

National Life Assn. v. Parsons, T. C. A., 170 S. W. 1038;
New York Life Ins. Co. v. Veith, T. C. A., 192 S. W. 605.

It cannot be doubted that the equal protection of the laws guaranteed by the Constitution includes "the equal right to resort to the appropriate courts for redress."

Missouri v. Lewis, 101 U. S. 22;
Power Mfg. Co. v. Saunders, 274 U. S. 490.

Any state may classify the persons within its jurisdiction, and impose a different burden upon the individuals of each class. But such classification must not be based upon arbitrary or irrelevant distinctions. It "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed."

> G. C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150;
> Magoun v. Illinois Tr. & Sav. Bk., 170 U. S. 283;
> A. T. & S. F. R. Co. v. Matthews, 174 U. S. 96;
> W. W. Cargill Co. v. Minnesota, 180 U. S. 452.

The "loss" which such an insurance company must pay is nothing but a debt.

It cannot be denied that the business of insurance is one clothed with a public interest. It is subject to public regulation. Doubtless it may be subjected to special rules as to those aspects wherein it touches the policy of the state in some way peculiar to itself. The state may always prohibit the making of contracts injurious to the plaintiff's interests. So, valued policy laws may be justified as tending to prevent reckless fire insurance with its attendant evils; and standard policy laws, because they make insurance contracts more nearly uniform and certain, and prevent the insertion in them of provisions dangerous to the common weal. Laws directing that copies of the applications be attached to the policies, laws providing that immaterial breaches of warranty shall not annul the insurance, laws requiring that notice be given of accruing premiums—all these deal with features of insurance business that are peculiar to it, and relative to which it may well be specially classed and specially regulated. But in the obligation to perform their contracts and pay their debts insurance companies do not differ

from other natural or artificial persons, and therefore in this regard they ought not to be classed by themselves. When a lawful contract has been made the public has no interest in it other than that it shall be fulfilled by both parties; and the courts should be equally open to them both for the double purpose of ascertaining their respective liabilities and enforcing the discharge thereof.

It is the duty of every person to pay his rightful debts; but it is not the duty of anyone to pay an unjust claim made upon him. Few courts would tolerate an attempt to make a policy of life insurance absolutely incontestable from its date. Fraud and self-destruction would be wholly nullified by such encouragement. Yet this partial and unequal statute goes very far towards driving all life, health and accident insurance companies away from the courts, and making their policies virtually incontestable. For no matter how convinced a company may be that a claim made upon it is wrongful, it dares not refuse payment unless it has in hand evidence sufficient to force a verdict from the jurymen whom the law tells that it is an unworthy suitor.

Certainly, in the matter of detecting, several months after the death of an insured, the state of the insured's mind with reference to a transaction to which an insurance company was not a party, an insurance company is on no different plane from that of any other natural or artificial person. An insurance company is no better equipped for the detection of the state of mind of policyholders than other natural or artificial persons. A life insurance company is not an alienist.

Certainly, an insurance company that relies on the presumption that a policyholder was in his right mind when he entered into a transaction with a third person is just

as reasonable as any other natural or artificial person in doing so. Certainly, in denying liability when it is not informed by the claimant that there is any contention that the policyholder was not in his right mind at the time of the transaction with the third person, an insurance company is just as reasonable as any other person, natural or artificial.

Under the circumstances of this case, to deny the defendant resort to the courts and to hold it absolutely liable for penalties and attorneys' fees, even though its liability to the plaintiff, if it should be found to exist, was one about which there might be an honest difference of opinion, and even though there has been no vexatious refusal on the part of the defendant to pay the plaintiff, is to take the defendant's property without due process of law and to deny to it the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution.

The Eighth Circuit Court of Appeals, in the recent cases of Standard Accident Ins. Co. v. Rossi, 35 Fed. (2) 667, and Inter-Southern Life Ins. Co. v. McElroy, 38 Fed. (2) 557, held that a similar Arkansas statute, if construed in the way that our Texas statute has been construed—as imposing an absolute liability on the part of the insurance company for penalties and attorneys' fees, even though "the refusal to pay without suit is based on an honest and fairly debatable difference of opinion as to the law involved," and even though there was no "vexatious and inescapable neglect and failure to respond to contract obligations"—would be unconstitutional, in that it would be violative of the due process of law and equal protection of the law clauses of the Constitution of the United States.

We are not unmindful that in 1901, and again in 1902, the constitutionality of the Texas statute was upheld by the United States Supreme Court.

> Fidelity Mut. Life Assn. v. Mettler, 185 U. S. 308; Iowa Life Ins. Co. v. Lewis, 187 U. S. 335.

In the Mettler case the constitutionality of the statute was attacked solely on the ground that the statute applied only to life and health insurance companies and did not apply to fire, marine and inland insurance companies and mutual benefit and relief companies doing business within the State of Texas. The Court held that the separate classification of life and health insurance companies was not arbitrary and unreasonable. It considered the question of constitutionality from no other angle.

The Lewis case merely followed the Mettler case, without discussing the question of constitutionality.

In the Mettler case Mr. Justice Harlan, with whom Mr. Justice Brown concurred, wrote a very strong dissenting opinion, in which he stated that, even though "a state may impose conditions upon its own and foreign corporations," he could not subscribe to the doctrine that "a provision of a state enactment relating to corporations, foreign or domestic, was legally operative and binding if such provision be inconsistent with the Constitution of the United States."

Since 1902 the views of the United States Supreme Court have undergone quite a development, particularly with reference to the meaning and applicability to foreign corporations of the Fourteenth Amendment. In Hanover Fire Ins. Co. v. Harding, 1926, 272 U. S. 494, Mr. Chief Justice Taft gives a very informative history of several decisions since 1906 which have brought about such de-

velopment and change of views. It can no longer be doubted that a state has no authority to impose "unconstitutional conditions" upon a foreign corporation that it licenses to do business within its borders.

We submit that it is time that the constitutionality of the Texas statute be examined anew, particularly as now construed by our Texas courts, and as applied to the specific circumstances of this case.

SECOND PROPOSITION.

Assuming such statute to be a valid law, still the defendant is not liable for the penalties and attorneys' fees thereby imposed, because no demand was made upon it for the payment of the loss before the suit was begun.

STATEMENT.

In her first amended original petition the plaintiff pleaded, with reference to a demand upon the defendant for the payment of the loss under the policy, that on or about November 4, 1931, through her attorney, she formally notified the defendant of the death of P. H. Williams and requested the defendant to send her proper forms for making proof of death under said policy; that on or about November 12, 1931, the defendant notified the plaintiff, through a communication to her said attorney, that it did not recognize any liability under such policy and that proof of death would not be required. The only further pleading with reference to a demand made upon the defendant was as follows:

> "That said communication dated November 4, 1931, from her said attorney to said defendant was not only a request for death forms as aforesaid, but was also, and was so intended by her and so construed by de-

fendant, as a demand for the payment to her of all amounts lawfully accrued to her as beneficiary aforesaid, that is, the face amount of said policy, to wit, the sum of ten thousand dollars ($10,000.00), less all lawful and valid indebtedness and advances thereon" (Tr., pp. 19, 20).

The letter from the plaintiff's attorney, referred to in the pleading, contained only advice of the death of P. H. Williams and a request that the defendant send proof-of-death forms for execution and return to it (Tr., p. 99). The reply letter from the company did contain a denial of liability (Tr., p. 100).

After such denial of liability, there was no further demand made upon the defendant, nor was any further demand claimed in the pleadings of the plaintiff.

ARGUMENT.

In a case where a loss occurs, the statute set out under the first proposition requires the imposition of a penalty where the insurance company "shall fail to pay the same within thirty days after demand therefor."

It has been held by the Supreme Court of Texas, however, that the mere furnishing of proof of death, followed by denial of liability by the insurance company, unaccompanied by further demand upon the insurance company, is insufficient to make the insurance company liable for penalties or attorneys' fees (Mutual Life Ins. Co. v. Ford, 103 Tex. 522, 131 S. W. 406).

CONCLUSION.

For the reasons hereinbefore given, the appellant, The Union Central Life Insurance Company, prays that the judgment of the trial court be reversed, and that the cause be remanded with such directions as shall be proper.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 208.

NANNIE MAY WILLIAMS,

Petitioner,

v.

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

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Supreme Court of the United States.

October Term, 1933.

NANNIE MAY WILLIAMS,
Petitioner,
v.
THE UNION CENTRAL LIFE INSURANCE COMPANY,
Respondent.

No. 208.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The petitioner's summary statement fails, partly because of omissions, and partly because of too great dispersion of facts stated, to disclose completely and clearly the essential circumstances and their chronology. We submit the following supplementary outline:

1. Policy sued on was a whole-life, level-premium policy of $10,000, issued as of age of insured on June 10, 1927 (Tr., p. 162), and requiring payment of premium, throughout life, of $449.10, on June 10th of each year (Tr., p. 83).

2. Annual premiums of June 10, 1928, and June 10, 1929, were paid in cash; that is to say, on notice advising amounts of premium and of current dividend, insured re-

mitted difference between dividend and premium (Tr., p. 159).

3. Insured carried six other policies in defendant company, and was financially unable to pay premium of June 10, 1930, on this and other policies, and accordingly obtained $848 from company on assignment of this particular policy as security (Tr., pp. 91-93), and in addition borrowed from company's Dallas agents, Lee & Lee, individually, for the purpose $1,643.63, on his note to them payable on or before December 20, 1930 (Tr., p. 154). The dividend of June 10, 1930, was used to minimize the cash payment necessary to settle the premium of $449.10 on the policy in suit (Tr., p. 159).

4. The company transmitted, and the insured received, the company's usual printed notice of approaching maturity of premium of June 10, 1931, of $449.10, and of dividend of June 10, 1931, of $74.80, requiring a cash remittance of only $374.30 (Tr., pp. 100-102, 161).

5. Insured had been unable to pay all or any portion of the note for $1,643.63 to Lee & Lee, which had been in default since December 20, 1930, and was unable to remit anything on account of the premium of June 10, 1931, now due (Tr., pp. 150, 152, 155, 159).

6. The policy allowed thirty-one days' grace in payment of premiums (Tr., p. 84, Art. 9).

7. During this thirty-one days of grace—from June 10, 1931, to July 11, 1931—the premium was not paid, and the insured remained silent; he made no request with reference to the dividend of $74.80 (Tr., pp. 159, 160). In the absence of request, the provision of the policy for automatic disposition of the dividend applied, to wit, as the respondent claims, and as the Circuit Court of Appeals

has found, payment in cash to the policyholder (Tr., p. 85, Art. 12; pp. 225, 226).

8. The cash surrender value of the policy on June 10, 1931, as specified in the policy, being the value on which all nonforfeiture benefits were based, was $910 (Tr., p. 88, Art. 23). This was the full reserve, or net, value of the policy, computed according to American Experience Table of Mortality, with interest at 3½ per cent, less a surrender charge of only $60, whereas statutes permitted the deduction of a surrender charge of $250 (Tr., p. 86, Arts. 15, 16). The value of $910, less the indebtedness of $898.88, including interest, left $11.12 (Tr., p. 159), which was insufficient to cover the cost of term insurance of the coverage during the days of grace (Tr., p. 88, Art. 23).

9. On July 11, 1931, as the respondent claims, and as the Circuit Court of Appeals has found, the rights of the parties became fixed. The insurance ceased and the former insured became entitled to the payment in cash of the current dividend of $74.80 (Tr., pp. 84, 85, 159, 223, 226).

10. The company in due course transmitted to its Dallas agents, Lee & Lee, on September 9, 1931, its check in favor of the former insured for an amount which included the dividend of $74.80 on the policy in suit, as well as dividends on other policies (Tr., p. 159).

11. Lee & Lee returned the check to the company on September 14, 1931, with statement that they purposed suing the former insured on his note of $1,643.63, in default since December 20, 1930, and garnishing the sum due him by the company (Tr., p. 96). But, before bringing suit, the agents sent a representative to San Angelo to discuss the matter with the former insured, and, as a result of the discussion, the former insured executed an order

referring to the policy in suit and other policies as having lapsed, and directing the company to pay Lee & Lee the amount of specified dividends thereon, including the dividend of $74.80 on the policy in suit, and executed new note for $914.77, the balance of the old note after the application of the dividends (Tr., pp. 149-151, 155, 98).

12. The company received such written order of the former insured, and remitted to Lee & Lee in due course, on September 28, 1933, its check for the dividends specified, including the dividend of $74.80 on the policy in suit (Tr., pp. 160, 164, 165).

13. On October 7, 1931, the company in due course, but without any requirement of policy, sent formal notice to the former insured of complete termination of his insurance (Tr., pp. 160, 165, 166). This notice duly reached the address of the former insured, but a member of his family testified that the same remained unopened until after his death (Tr., p. 179).

14. The former insured died October 15, 1931, having been ill since August 16, 1931 (Tr., pp. 102, 103).

15. Aside from the foregoing, the petitioner claims that two communications in the record, both dated after July 11, 1931, when the rights of the parties became fixed, have some pertinency:

> First. A memorandum of figures sent by the company under date of July 15, 1931, to Lee & Lee (Tr., pp. 175-178), having relation to some plan to restore and permit the carrying of $15,000 of insurance (but not the policy in suit) and of using to that end all sums to which the former insured was entitled, including the dividend on the policy in suit. There is no evidence that this memorandum was ever communicated or exhibited to the former insured. The

Circuit Court of Appeals correctly said of this paper: "This statement, sent with statements of the other policies whose surrender was to free the $15,000 policy, was only a suggestion of what could be done, not a declaration of what had been done" (Tr., p. 227).

Second. A letter by Lee & Lee to the company on September 14, 1931 (mentioned in paragraph 11 above), returning the company's original remittance for dividends, and stating that they purposed suing the former insured and garnishing the sum represented by the check, and explaining that about September 1st their local agent at San Angelo had succeeded in getting in touch with Mr. Williams, and that "Mr. Williams told him he was not going to sign the surrender voucher with any part of it made payable to Lee & Lee; that it was a crooked deal and that he was going to have every nickel applied towards paying these policies as far as it would carry them." This had reference to the above-mentioned plan to obtain all sums to which the former insured was entitled, including the dividend on the policy in suit, and to use the same in restoring and carrying $15,000 of insurance (not the policy in suit, and not as term insurance, but by paying the regular premiums on the restored policy), and perhaps also of making some partial payment on the note to Lee & Lee for $1,643.63. The Circuit Court of Appeals correctly said of this expression: "There were seven policies involved. This statement was too indefinite to serve as a direction to apply this dividend in any particular way. Moreover, it was too late for him to apply it to extend this policy, for it had become void on July 11th, and would only be reinstated on payment of the premium with interest and satisfactory medical examination, and Williams since August 16 had been an ill man" (Tr., pp. 227, 228).

The petitioner's brief is in two parts.

The first part is the brief proper, and is bound with the petition for writ of certiorari. The argument in it is distributed among six points, lettered A, B, C, D, E and F.

The second part is bound separately as the "Supplemental Brief of Petitioner." The argument in it is distributed among three points, numbered 1, 2 and 3.

The respondent will discuss all the points separately in the order indicated above.

References to the petitioner's brief in the respondent's discussion of Points A to F will refer to pages of the petition for writ of certiorari and accompanying brief; whereas, references in the discussion of Points 1, 2 and 3 will be to pages of the petitioner's supplemental brief aforesaid.

REPLY TO PETITIONER'S POINTS A TO F.

POINT A.

The 1931 dividend was not a part of any contractual value to be applied to the purchase of term (or extended) insurance. On the contrary, the company's contractual obligation with reference to the dividend of $74.80, of June 10, 1931, was to pay the same in cash to the policyholder.

The contention of the petitioner in this case under this and other points of her argument involves a misinterpretation of numerous insurance terms. These terms are of definite meaning, and are accurately used in policy and statute. Obviously, any misinterpretation of these terms is of serious consequence. Hence, the respondent, in its brief in the Circuit Court of Appeals, discussed at some length the provisions of contract and statute and certain well-understood principles of insurance. That discussion is reproduced here for whatever use it may serve.

But, before beginning that reproduction, we desire to set forth a brief outline of the argument of the petitioner under this point, as contained in her brief, and to make some comment on the same, in the hope that the convenience of the Court may be promoted thereby.

Outline of Petitioner's Argument.	*Respondent's Comment.*
[pp. 21-22] One sentence of article 8 is in conflict with one sentence of article 12.	No conflict whatever between these two sentences. First sentence does not mention or concern dividends.

Outline of Petitioner's Argument.	*Respondent's Comment.*
	On contrary, it refers for its own specific interpretation to article 16, where are set forth the details of the application of surrender value, not of dividends. Dividends are separately and specifically covered by articles 11 and 12.
[pp. 22-27] Atlantic Life Ins. Co. v. Pharr, 59 Fed. (2d) 1024, and Harvey v. The Union Central Life Ins. Co., 45 Fed. (2d) 78.	These cases fully considered hereinafter.
[pp. 27-30] 1931 premium notice operated to make the 1931 dividend a part of the policy value or surrender value.	This premium notice does not purport to alter contract, and is not basis of either allegation or proof of misleading. It is merely usual printed notice that premium of $449.10 is due June 10, 1931, that current dividend of $74.80, if used to reduce the premium payment, will leave an amount of net remittance required of $374.30. Notice refers to policy for ascertainment of rights of parties. Differences between 1928-1929 and 1931 dividend notices merely differences in printed form. Petitioners' claim (p. 29) "that at some time between the year 1929 and June, 1931,

Outline of Petitioner's Argument.	*Respondent's Comment.*
	defendant in some manner learned that the insured wanted all dividends applied to the purchase of insurance," is contrary to undisputed evidence (Tr., pp. 160, 159).
[pp. 30-40] Actuary's memorandum of figures of July 15, 1931, makes 1931 dividend a part of the surrender value.	This is same memorandum referred to in section 15, on page 4, ante. Manifestly, it is of no significance in determining the rights of the parties.

The contractual obligation with reference to the dividend of $74.80 of June 10, 1931, is expressed in the policy as follows:

> "In the event * * * the policy shall lapse, the dividend then due shall be paid in cash" (Tr., p. 85, Art. 12).

The stipulation is contained in an article devoted to provisions for the automatic disposition of dividends. Such article follows another devoted to options open to the policyholder, for his choice, regarding the disposition of dividends.

Such "Dividend Options" article (so headed in the policy itself) follows with such explanatory matter as is deemed proper (Tr., p. 85):

"11. Dividend Options.	**Explanatory Matter.**
[1] Dividends may be withdrawn in cash;	

11. Dividend Options.	Explanatory Matter.
[2] or applied to the payment of premiums;	Each previous dividend had been so applied, in connection with cash payment to the company of the balance of the premium. The dividend of $74.80 was insufficient to pay the annual premium of $149.10. The policy provided for acceptance of nothing less than an annual premium; but the company would have accepted as little as a quarterly premium, had request for change of policy in this respect been made. But the dividend was insufficient for payment even of a quarterly premium. Hence, such method was unavailable.
[3] or left to accumulate with interest at three per cent, increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy, subject to withdrawal at any time;	No such request ever had been made. No dividend had ever been left with company.
[4] or applied to the purchase of paid-up participating additions to the policy,	No such request ever had been made. No dividend had ever been so applied. The "paid-up participating additions to the policy" thus purchased with dividends are, and always have

11. Dividend Options.

[5] convertible into cash at any time for the amount of the original dividends or the reserve of the additions, if larger,

[6] but payment may be deferred by the company ninety days from the date of application therefor."

Explanatory Matter.

been, known in the business as "dividend additions," or "paid up additions."

The company, of course, carries a reserve against such dividend additions, as well as against the policy proper, and such "dividend additions" may be surrendered for, or converted at any time into, cash for the amount of the dividend, or of the reserve, if larger than the dividend (the reserve being equal to the amount of the dividend plus interest but less mortality cost).

It will be observed that there is here no option in the policyholder to request, and no promise by the company to grant, as a substitute for the dividend, any term insurance in favor of the policyholder's estate, or of the policyholder's beneficiary, or, indeed, of anyone.

Further, it will be observed that any option must be exercised before any provision for automatic disposition becomes applicable under the next succeeding article. In other words, such option must be exercised at least within the thirty-one days of grace after premium maturity. The dividend becomes available at premium maturity, and either the policyholder's selected option of disposition or

the automatic disposition is put into effect by the end of the grace period.

The "Automatic Disposition" article (also thus termed in the policy) follows, with similar explanatory matter (Tr., p. 85):

"12. Automatic Disposition.	**Explanatory Matter.**
[1] On payment of the premium	But the premium was not paid. Hence this was inapplicable.
[2] or on the policy anniversary if no further premium is payable, if no other option has been elected,	But further premiums were payable under the policy; that is, it had not become paid up, as, for instance, a 20 payment life policy is paid up at the end of 20 years. Hence this was inapplicable.
[3] the dividend then due shall be applied to the purchase of paid up additions.	
[4] In the event	
[5] of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected,	But the insured did not die during the days of grace. Hence this was inapplicable.
[6] **or if the policy shall lapse.**	**The policy did lapse and this automatic provision became applicable.**
[7] **the dividend then due shall be paid in cash.**	**The dividends became payable in cash.**
[8] At the death of the in-	But death did not occur

12. Automatic Disposition.	Explanatory Matter.
sured during the continuance of the policy, the pro rata part of the dividend for the current policy year shall be paid in cash."	during the continuance of the policy. Hence this provision was inapplicable.

Also, as usual, the policy provides that in the event of nonpayment of a premium, the surrender value of the policy may be applied in any one of various ways, at the option of the policyholder, and that if no option be exercised by the policyholder the surrender value shall be automatically applied by the company in a particular manner.

The policy specifies the exact amount in figures of the cash surrender value at the end of each of various years. The amount so specified for June 10, 1931, is $910.00 (Tr., p. 88). This cash surrender value constituted the full reserve under the policy, computed, as specified therein, on the American Experience Table of Mortality, with interest at the rate of 3½ per cent, less a surrender charge of $60.00 (Tr., pp. 174, 86, Arts. 14, 15).

A statute of Texas (R. S., Art. 4732), similar in terms to statutes of numerous other states, requires that policies of life insurance issued in Texas shall contain a provision whereby the insurer shall stipulate for the payment to the insured, or for the application to the purchase of some form of insurance, upon the occasion of a premium default, of the reserve on the policy, less a certain surrender charge; but the permitted surrender charge is 2½ per cent of the face amount of the insurance, or, in this case, 2½ per cent of $10,000.00, or $250.00. Hence, the provisions of the policy in question are more favorable to the policy-

holder than the statute of Texas requires, in that the cash surrender value promised by the company is $910.00, whereas a figure of $720.00 ($970.00 less $250.00) would have satisfied the Texas statute.

The policy extends to the policyholder three options, labeled Options 1, 2 and 3, for the use of the surrender value. They are declared to be all of equal value. It is specified that: "If, on failure to pay a premium, no option is exercised, such value shall be applied as provided in Option 1" (Tr., p. 86, Art. 16).

It is stated that such options are granted "provided there be no indebtedness or advances on the policy" (Tr., p. 86, Art. 16).

But, further, it is stipulated that "if there be any indebtedness or advances on this policy, the cash value shall be reduced thereby; the paid up value shall be reduced proportionately, and the extended insurance shall be for the face value of the policy, less the indebtedness and advances and for such term as said reduced cash value will provide" (Tr., p. 88, Art. 22).

The options, together with such explanatory matter as is deemed proper, follow (Tr., pp. 87-88):

"17. Option 1—Extended Insurance.

[1] Applied to the extension of this policy as participating term insurance from the date to which premiums have been paid, without any further payment (Table 1).

Explanatory Matter.

The cash surrender value specified for June 10, 1931, was $910. Had there been no indebtedness against the policy, this $910, if this option had been exercised, or, indeed, if no option had been exercised, because Op-

17. Option 1—Extended Insurance.

Explanatory Matter.

tion 1, in that event, was automatic, would have been used to purchase Participating Term Insurance from the company. This is a form of insurance different from and cheaper than Ordinary Life Insurance, which was the type covered by the policy. The $910 cash surrender value would have been sufficient to provide $10,000 of "Participating Term Insurance," according to the table in the policy, for 4 years 330 days, or 1,790 days, and at that rate each day's insurance would have cost $910 divided by 1,790, or between 50 and 51 cents, whereas the type of insurance granted by the policy at $449.10 per year of 365 days, cost $469.10 divided by 365, or $1.29 per day. By the terms of the above quoted provision, applicable in case of indebtedness, the indebtedness then amounting to $898.88 was deductible from the cash surrender value of $910, leaving $11.12, and such $11.12 was applicable to the purchase of extended

17. Option 1—Extended Insurance.

[2] The value of any paid up additions will be used to increase the term of extension.

Explanatory Matter.

insurance for $10,000 (less $898.88) at the rate of between 50 and 51 cents per day for $10,000 of insurance. Such sum would have purchased only 22 days' insurance, and the extension would date from June 10, 1931, and hence the sum available would not even cover the cost of the 31 days of grace after the premium maturity.

Had there been any "paid up additions" to the policy purchased with dividends under the terms of the 4th dividend option under Article 11, hereinbefore copied, the value of such additions, or which is the same thing the reserve held by the company against such "paid-up additions," would be likewise applied to the purchase of "Participating Term Insurance," increasing or lengthening the term of such insurance. Here there were no paid-up additions. However, the contention of the plaintiff is that the dividend of June 10, 1931, should be treated as if it were a paid-up addition.

17. Option 1 Extended - Insurance.

[3] Accumulations of dividends at interest may be applied to increase the term of extension.

Explanatory Matter.

This provision is applicable to the third dividend option under Article 11, hereinbefore copied. If the policyholder had selected this third dividend option and had left a prior dividend "to accumulate with interest at three per cent increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy subject to withdrawal at any time," as specified in such option, then such "accumulations of dividends at interest" would also be applied to the purchase of "Participating Term Insurance" and would lengthen the term of such insurance. Here the policyholder had made no selection of the third dividend option, and had left no dividend with the company to accumulate with interest under the terms of the option. However, the plaintiff contends that the dividend of June 10, 1931, should be treated as if it had been left with the company to accumulate under the terms of such option,

17. Option 1—Extended Insurance.

[4] Dividends on extended insurance shall be paid in cash and only for completed policy years."

Explanatory Matter.

even though in the same breath the plaintiff claims that instead of being left with the company to accumulate at interest, it should be immediately used by the company in the purchase of participating term insurance.

The insurance purchasable under Option 1, it will be observed, is designated as "Participating Term Insurance." The appellation "Participating" indicates that such insurance will share in dividends. Hence, some dividends will be payable on such participating term insurance. This provision is a stipulation that such dividends shall be paid in cash. They shall not be used in the purchase of further participating term insurance, which would increase or lengthen the term of such insurance. In other words, they are payable in cash, just as is the dividend of June 10, 1931, under the terms of the provision applicable thereto, hereinbefore copied.

The foregoing article contains the only expressions upon which the petitioner has heretofore based any contentions in this case, these expressions being contained in subdivisions [2] and [3] of the article, as above copied.

However, for the information of the Court, it may be desirable to set forth, in the same manner as above, the provisions of articles 18, 19 and 20 constituting other options open to the policyholder for the use of the cash surrender value. Such provisions will indicate the choices that were open to the policyholder, and the recurrence therein of the expressions "Paid up additions," "Accumulations of dividends at interest," and of "Dividends * * * shall be paid in cash," will illustrate the identity of the meaning of these expressions in all instances and will throw light upon the commonness of their use and of the understanding of their significance in insurance contracts.

"18. Option 2 Paid up Insurance.

[1] Applied to the purchase of paid up participating insurance, on written request and the surrender of the policy before the expiration of the days of grace (Table 2).

Explanatory Matter.

If the policyholder had selected this option and there were no indebtedness against the policy, the $910, according to the policy, would purchase paid-up participating insurance of $1,600. This means that the policy would have been paid up for life for $1,600. In other words, each dollar would purchase paid-up insurance for $1,600 divided by $910, or $1.58. The effect of the provision with reference to indebtedness against the policy would have been, had

18. Option 2—Paid-up Insurance.

Explanatory Matter.

this option been selected by the policyholder, that the indebtedness, $898.88, would have been deductible from the cash surrender value of $910, and the difference of $11.12 would be applied to the purchase of paid-up insurance, and the same would have purchased $17.57 of paid-up insurance.

[2] Any paid-up additions will be added to the amount of the paid-up insurance.

Paid-up additions to the policy, had any been purchased with dividends in pursuance of the fourth option under Article 11, hereinbefore copied, would have been of precisely the same character as the paid-up participating insurance purchasable with the cash surrender value under this option, and the face amount of such paid-up additions would have been added to the face amount of the paid-up participating insurance purchased with the cash surrender value. But here, of course, there were no paid-up additions, and no paid-up participating insurance, and no option exercised to apply the $11.12 of remaining cash surrender

18. Option 2—Paid-up Insurance.

[3] Accumulations of dividends at interest may be applied to purchase additional paid-up insurance provided the total amount of paid-up insurance shall not exceed the face amount of the policy.

[4] Dividends on paid-up insurance shall be paid in cash."

Explanatory Matter.

value to the purchase of paid-up insurance.

Had the policyholder selected the third option under Article 11, hereinbefore copied, and left some former dividend with the company "to accumulate with interest at three per cent increased from surplus interest earnings as apportioned by the directors, until the maturity of the policy subject to withdrawal at any time," then under this provision such accumulation of dividends at interest would be applied to purchase additional paid-up insurance, provided, however, that the total amount of paid-up insurance should not exceed the face amount of the policy.

This provision is similar to the provision last appearing in Article 17, above quoted. The "paid-up participating insurance," it will be observed, is "participating"—that is to say, it shares in the dividends—hence dividends will be payable thereon. Such dividends under this provision are to

18. Option 2—Paid-up Insurance.

Explanatory Matter.

be paid in cash and are not to be applied to the further purchase of paid-up participating insurance.

"19. Option 3—Loan.

[1] Borrowed or taken in advance in whole or in part on the sole security of the policy, on assignment thereof, less the unpaid balance of the current year's premium and any indebtedness and previous advance on this policy, at six per cent interest, payable annually on the anniversary of the policy, interest to be discounted and paid in advance (Table 3).

Failure to repay any such advance or to pay interest shall avoid this policy whenever but not until the total indebtedness and advances hereon, with interest, shall equal or exceed the then loan value and not until one month after notice shall have been mailed by the Company to the last known address of the insured, and of the assignee, if any.

[2] The loan value will

Here, again, if the policy-

19. Option 3—Loan.

be increased by the value of any paid-up additions.

[3] The loan value, less interest to next anniversary, is available at any time during the policy year if premiums have been paid to the end of the year. Consummation of loans other than paid-up premiums on loans in this Company may be deferred by the Company ninety days from the date of the application therefor."

"20. Option 4—Cash.

[1] Collected in cash on written surrender of the policy before the expiration of the days of grace (Table 4).

[2] The cash value will be increased by the value of any paid-up additions.

Explanatory Matter.

holder had selected the fourth option under Article 11 and caused some former dividend to be applied to the purchase of paid-up additions to the insurance, then the loan value would be increased by the value of the paid-up additions; or, which is the same thing, the reserve carried by the company against these paid-up additions.

Here, again, if the policyholder had selected the fourth option under Article

20. Option 4—Cash.

Explanatory Matter.

11, hereinabove quoted, and had caused some prior dividend to be applied to the purchase of paid-up additions to the policy, the cash value available on surrender of the policy would be increased by the value of the paid-up additions, or, which is the same thing, the reserve carried by the company against such paid-up additions.

[3] Payment may be deferred by the Company ninety days from the date of application therefor."

The Court will have observed the repetition of the expressions "Paid-up additions," "Accumulations of dividends at interest" and "Dividends * * * shall be paid in cash" in the quoted articles. These expressions are repeated in subdivisions of the articles as follows:

"Paid-up additions."

Art. 11, sub. 4
Art. 12, sub. 3
Art. 17, sub. 2
Art. 18, sub. 1, 2
Art. 19, sub. 2
Art. 20, sub. 2

"Accumulations of dividends at interest."

Art. 11, sub. 3
Art. 17, sub. 3
Art. 18, sub. 3

"Dividends * * * shall be paid in cash."

Art. 11, sub. 1
Art. 12, sub. 7
Art. 17, sub. 4
Art. 18, sub. 4
Art. 20, sub. 1

The expressions "Dividends * * * shall be paid in cash" and "Accumulations of dividends at interest" seem to us nontechnical and involving no possibility of doubt concerning their proper interpretation.

The terms "Paid-up additions" and "Dividend additions" are technical terms. They have a perfectly definite and well-understood meaning in the insurance business, and because the plaintiff, by her pleadings, contended that the dividend of June 10, 1931, was, or should be treated as, a "Paid-up addition" or "Dividend addition," the defendant deemed it proper to introduce evidence concerning the meaning of these terms in the insurance business. One of the witnesses was an actuary for the defendant company; the other was the actuary for the Southwestern Life Insurance Company, a Dallas, Texas, institution. Both testified that the terms had only one meaning, namely, the small paid-up insurance additions to the policy purchased by dividends; that the terms were commonly employed in the business; that they had never had any other than this meaning (Tr., pp. 143-145, 169). This evidence was uncontradicted.

Facts With Reference to Lapse of Policy and Actual Payment of Dividend.

The policyholder had paid each premium prior to that of June 10, 1931, and in so doing had applied the annual

dividend as part payment (Tr., p. 159); but the policyholder had exhausted his borrowing power under his insurance in June, 1930, and, in addition, indulging the hope of improved financial condition within the ensuing twelve months, had borrowed from Lee & Lee $1,643.63 with which to maintain his insurance. But he had been unable to repay this sum even in part, and was wholly unable to settle in any way the premium of June 10, 1931. The thirty-one days of grace expired without any payment, in whole or in part, and without the specification of any option of disposition of dividend or of cash surrender value (Tr., p. 160). The evidence is undisputed that the company received no such specification (Tr., p. 160).

The company, in due course, prepared its check for the dividend of $74.80, and for dividends on other policies, as well, in favor of the policyholder, and transmitted the same to its agents, Lee & Lee. Lee & Lee, however, returned the check, and, having sent their attorney to interview the policyholder with reference to the payment of the policyholder's note to them of $1,643.63, and having obtained from the policyholder an order upon the company for the payment of the dividend to them, and having, upon receipt of such order, canceled and surrendered to the policyholder the note of $1,643.63, and accepted a renewal note for the difference, transmitted the written order to the company. The order was executed by the policyholder at his own home on September 18, 1931; and the company, on September 28, 1931, transmitted its check for the dividend to Lee & Lee, which check was promptly paid.

The policyholder knew and was informed that the policy had lapsed when he executed the order of September 18, 1931; but the company, also in due course, by letter dated October 7, 1931, advised the policyholder of the fact that

the policy had become null and void, and had been canceled (Tr., pp. 165-166). This notice was duly received by the policyholder prior to his death, but, according to the testimony of his son, remained at the house unopened until after the death.

No claim of mental incompetency was asserted by the plaintiff at the time of the transaction between Lee & Lee's attorney and the policyholder on September 18, 1931, though the plaintiff was in an adjoining room. No claim of such mental incompetency was asserted by anyone until after the death of the policyholder. The company had no information of any such claim until long after this suit was brought, and then only in the form of a letter received from its counsel in charge of the suit, indicating that the plaintiff was making or intended to make such claim (Tr., p. 160).

The petitioner does not claim that the policyholder at any time prior to the expiration of the thirty-one days of grace, June 10, 1931, communicated to the company, or any agent of the company, any selection of option with reference to the disposition of the dividend of June 10, 1931, or of the small remaining balance of the cash surrender value, $11.12. The undisputed evidence is that the company received no information whatever concerning the policyholder's wishes on this subject, and the automatic provisions of the policy took effect.

The petitioner's entire claim of any expression of intention or desire on the part of the policyholder with respect to the dividend disposition, at variance with the payment of the dividend in cash to Lee & Lee, is based upon a passage in a letter from Lee & Lee to the company, dated September 14, 1931. In this letter Lee & Lee returned the

first dividend check to the company and advised the company of the personal loan that they had made to the policyholder the year previous for the purpose of enabling him to maintain his policy in force, and of their efforts since to collect this advance, and of their intention to bring suit against the policyholder and to garnish the dividends in the possession of the company if the policyholder declined to pay. The letter was written before they obtained the written order from the policyholder dated September 18, 1931. The passage which the petitioner contends constitutes some expression of the policyholder on or about the 1st of September, 1931, is as follows:

> "Our agent at San Angelo did not seem to press this matter with the proper amount of energy in seeing Mr. Williams personally until finally about the 1st of September he did see Mr. Williams and Mr. Williams told him he was not going to sign the surrender voucher with any part of it made payable to Lee & Lee; that it was a crooked deal and that he was going to have every nickel applied towards paying these policies as far as it would carry them. In the face of this cold-blooded refusal of Mr. Williams we have had our attorney prepare papers suing Mr. Williams for the note and garnishing the company for all of these dividends" (Tr., p. 97).

But it will be noted that this recites some conversation about the 1st of September, 1931, long after the policy had lapsed, the days of grace had expired, the disposition of the dividend had become automatically fixed as payable in cash, and all time for the selection of any option had expired. Also, that it was not in terms applicable to any option granted by the contract, even had the option been properly exercised within the thirty-one days of grace, and that if application to some option be forced, the ex-

pression in the letter would most nearly fit the option for the purchase of a paid-up participating addition to the policy, specified in subdivision 4 of article 11 hereinbefore copied. This option would have entitled the policyholder to a paid-up addition of $17.57, or $1.58 of paid-up insurance for each dollar of dividend applied to the purchase. But in reality the recital evinces an intention of the policyholder to permit to remain lapsed all but a small part of his insurance, obtain in cash all moneys available under such policies, and use the same in reinstating and continuing in force some small portion of his insurance, and not using any of the cash to make good his personal promise and obligation to Lee & Lee for the $1,643.63 they had advanced for him the preceding year.

Little argument seems necessary or appropriate in the facts of this case.

The relationship between the petitioner and the respondent is purely one of contract. The respondent is not liable to the petitioner unless it has stipulated such liability.

The contract between the parties is to be fairly interpreted. It is not to be twisted or distorted, or its plain terms altered by any process of metaphysics or dialectics in order to award the petitioner a judgment.

It is to be interpreted in accordance with the reasonable intent of the parties gained from the language of the contract.

Obviously, when the company promised to distribute dividends, it was necessary that the contract provide when and how the company would distribute the same.

The business of insurance is concerned with the risk

of death. That risk in an individual case may change greatly in a single day—even in a single minute. Any choice of alternatives, involving either an increase or a termination of the risk, should be promptly made. An insurance company must be able to know the risks for which it is liable. It cannot carry transactions along in suspense, in such wise that it will be held for the risk when that is for the advantage of the policyholder and, on the other hand, will be required to return money when, as it develops, the carrying of the risk would have been for its advantage.

By the policy provisions, the dividends were made payable by the company at the same time that premiums were made payable to the company.

As the policy provisions were designed to allow to the policyholder a grace of thirty-one days in the payment of the premium, they also afforded him the same margin of time in the selection of the desired disposition of dividends.

But the thirty-one days of grace having expired, the design was that the rights of company and policyholder should become fixed with reference to dividends as well as premium default.

The parties were at liberty to agree as they pleased, no statute intervening, concerning the disposition of the dividends.

The policy provisions upon which they agreed contained many repetitions of the expression, or its equivalent, that "Dividends * * * shall be payable in cash.". These are in contrast with repeated expressions that dividends may be applied in the purchase of paid-up additions, or may be allowed to accumulate with the company at inter-

est, and with repeated other expressions that the cash surrender value may be applied to the purchase of term insurance upon premium default, or may be applied to the purchase of paid up additions. The language that "dividends * * * shall be payable in cash" is plain, everyday language. There can be no question that ordinary men would understand by such language that dividends should be paid or payable in money of the country, and not in some form of substituted insurance contract.

The policy provisions in articles 11, 12, 17, 18, 19 and 20 hereinbefore quoted indicate a careful attempt to distinguish between the payment of dividends in cash and the use of dividends to purchase some form of substituted contract from the company an attempt to specify just when the dividends may or shall be applied to the purchase of such a substituted contract, and when, on the other hand, they shall be paid in cash.

Undoubtedly, in a business as highly competitive as life insurance, such attempt at distinction and specification was designed to accord with the wishes and the interests of insurance buyers.

The automatic provision for payment of the dividend in cash, with which we are concerned in this case, is a provision applicable to the contingency that the premium has not been paid and that the policy itself has lapsed, and that the policyholder has selected no other disposition of the dividend. What fairer provision to the policyholder could there be? He has the right within the thirty-one days of grace to indicate, within the range of options allowed to him (but it will be recalled that the purchase of term insurance is not one of such options), how the dividend shall be disposed of. His omission to select some

other disposition is in itself an indication of his acceptance of, and satisfaction with, the automatic provision, namely, payment in cash.

The policyholder who voluntarily has relinquished, or who, from reduced financial circumstances, has been compelled to relinquish, a policy of insurance, may profit more from a cash payment, though small, than from a substituted insurance contract continuing for only a short time.

Especially may he so profit when, as here, he receives the dividend (Tr., p. 89, Art. 25), whereas the substituted insurance contract advantages only his beneficiary.

The policyholder has the right and the means of determining which is the better bargain for himself. His omission to select some other disposition is an indication of his decision to accept cash.

Had he desired to receive the cash and to apply it in reduction of the lien against the policy, he could have done so. He chose not to do so.

He did not owe the policy lien. It was not indebtedness. It was a mere lien. A desire to apply the dividend on such lien, in the case of a lapsed policy, would be most extraordinary. It would not be the natural or expected expression of ordinary human nature.

Mr. Justice Holmes, in Orleans Parish v. New York Life Ins. Co., 216 U. S. 517, said:

> "The so-called liability of the policyholder never exists as a personal liability, it never is a debt, but is merely a deduction in account from the sum that the plaintiffs (the insurance companies) ultimately must pay. In settling that account, interest will be computed on the item for the reason that we have

> mentioned, but the item never could be sued for, any more than any other single item of a mutual account that always shows a balance against the would-be plaintiff. In form it subsists as an item until the settlement, because interest must be charged on it. **In substance it is extinct from the beginning**, because, as was said by the judge below, **it is a payment, not a loan.**"

Wagner v. Thieriot, 197 N. Y. S. 560, affirmed by the New York Court of Appeals, 142 N. E. 295, is to the same effect.

It is plain that the company has attempted, in the various instances in which the policy of the company provides that dividends shall be payable in cash, to definitely fix and establish that cash as the limit and extent of its liability. It arranges and conducts its business, reports its liability and distributes its dividends on that basis.

Any decision disrupting this business arrangement and conduct and requiring the company, in addition to the payment of the dividend in cash, also to substitute term insurance whenever, as it subsequently develops, that would be to the advantage of the policyholder, would be destructive of business stability, as well as of legal principles.

No policy provision contains any promise whatever that a dividend may be applied to the purchase of term insurance. The options were that dividends might be withdrawn in cash, or applied in payment of premiums, or applied to the purchase of paid-up additions to the policy, or left with the company to accumulate at interest until the maturity of the policy, subject to withdrawal in cash at any time. No ground exists in law or morals for requiring the company to grant as a substitute, after the

death, a contract of term insurance which shall cover the death.

No one of the options open to the policyholder was specified by him.

If the policyholder, on some prior occasion, instead of using, as he did, the dividends, had declared to the company that he would allow such dividends to accumulate with it at interest until the maturity of the policy, then any dividends accumulated under this selection of option would, under article 11 of the policy, in the event of subsequent premium default, have been usable, at the option of the policyholder, in connection with the cash surrender value, for the purchase of term insurance.

But the policyholder, instead of allowing dividends to accumulate, had used the same; he had never notified the company that he desired or would permit dividends to accumulate with it at interest until the maturity of the policy. The dividend in question became subject on June 10, 1931, to the disposition, and choice of disposition, of the policyholder, and so remained during the thirty-one days of grace, but at the expiration of that time, no disposition or choice having been made, the dividend became an obligation definitely payable in cash, and not otherwise. The petitioner's claim that it should have been immediately applied to the purchase of a term insurance contract is utterly inconsistent with any actual or authorized accumulation at interest until the maturity of the policy.

To sanction such a claim would do violence to both contract and morals.

Further, the petitioner claims that the dividend of June 10, 1931, should be treated as a "paid-up addition" to the

policy. But he points to no ordinary or everyday usage anywhere constituting a dividend a "paid-up addition." Both the word "paid-up" and the word "addition" are wholly foreign to the conception of dividend. Obviously, "paid-up addition" is a term of the insurance business, and the uncontradicted evidence leaves no doubt whatever that such term neither has, nor ever has had, any other meaning than a paid-up addition to an insurance policy purchased with a dividend the terms "paid-up addition" and "dividend addition" being synonymous.

In Gardner v. National Life Ins. Co. (1931, N. C.), 161 S. E. 308, the plaintiff contended, as here, that the company should have applied a dividend to the purchase of term insurance so as to extend a lapsed policy to a date past the death of the insured. The cash surrender value of the policy less the indebtedness left a sum of $2.31, which was applied to the purchase of term insurance, but which did not extend to the death of the policyholder. It was essential to the plaintiff's purposes that she show that some additional sum should have been applied by the company to the purchase of such term insurance. The dividend option provisions of the policy were very similar to those in the present case. The policyholder had elected at the time of applying for the insurance that the dividends should be "left with the company at interest unless otherwise ordered." One dividend had accrued and had been paid to him in cash. The second dividend accrued at the same time that premium default occurred. The company retained this dividend. The plaintiff claimed that it should have been applied to the purchase of term insurance. The policy in that case did not provide that dividends left with the company to accumulate at interest until the maturity of the policy should be usable in the purchase of term insurance.

The Court said:

"The policy provides that, unless the insured shall elect otherwise prior to thirty days after any dividend is due, the same shall be held by the company, at interest, to be withdrawn by the insured at any time, or to be included in any cash settlement of the policy. Although he had notice of the dividend due on May 11, 1930, and of his right to direct its application to the payment on the premium due on said date, or to the purchase of extended insurance, the insured did not order such application. He elected that the dividend should remain with the defendant, at interest, in accordance with his direction given in his application for the policy. In view of the express provisions of the contract between the insured and the defendant, as clearly and plainly expressed in the policy, the defendant had no right, in law or in equity, to apply the dividend declared prior to May 11, 1930, and due at said date, as a payment on the semiannual premium due on May 11, 1930, or to the purchase of extended insurance. If in violation of its contract with the insured, with respect to this dividend, the defendant had so applied it, it would have, nevertheless, been liable to the insured for the amount of the dividend, with interest, when called upon by him for its payment. There is no principle of law or equity upon which the defendant can be held liable to the plaintiff, because after the death of the insured within the time for which the policy would have been extended, if the insured had directed that the dividend be applied to the purchase of extended insurance, it appeared that such application would have been to the interest of the plaintiff, as beneficiary in the policy."

In Hutchinson v. National Life Ins. Co. (1917, Mo. App.), 195 S. W. 66, it was contended that a dividend should have been applied in some way for the purchase

of term insurance. The "net value" or "reserve" of the policy was usable for the purchase of term insurance, and it was contended, first, that the dividend was a part of the net value, and, this failing, it was contended that, anyhow, on some ground, the dividend should have been used by the company to purchase term insurance. The Court said:

"This brings us to the final claim that the dividend should be considered as a part of the net value of the policy. The 'net value' at a given time was shown at the trial to be the 'reserve.' This is conceded, and it is the view adopted by the authorities (Rose v. Insurance Co., 153 Mo. App. 90, 132 S. W. 613; Fable v. Insurance Co., 155 Mo. App. 15, 134 S. W. 60). The statute enacts the process whereby the net value is ascertained and does not include an unpaid dividend. On the other hand, the contract in the policy is that the unpaid dividend is to be applied in part payment of the next annual premium.

"Running through the argument for plaintiff there is to be found a confusion of statement as to the application of the dividend of $19.12, declared by defendant on the 31st of December, 1913. First is the insistence that it should be applied to the payment of the premium, then follows an assumption that the dividend, thus applied, bought extended insurance. We think that does not follow. The two things are wholly disconnected and distinct matters. A sum which is to be used in payment of premiums becomes a part of the premium fund, and pays, or helps to pay, the premium which buys the regular insurance, and furnishes no part of the fund which purchases extended insurance, except as it may do so indirectly by forming a part of the reserve. The fund which buys the latter insurance is provided by law, and is ascertained after the manner pointed out in the statute; while the former is provided for by the con-

tract, and contemplates a continued live contract. The latter is attached by law to prolong the life of a contract which, if left to its own terms, would be ended by forfeiture. Plaintiff truly says, at page 10 of the brief in her behalf, that 'the policy provided that the dividend of $19.12 should be applied as a credit on the premium.' But it is immediately added that this, at the rate per day, 'carried the insurance 118 days,' a period long beyond the date of deceased's death. The policy does provide that:

"'Dividends assigned by the company shall be applied to the reduction of each subsequent year's premium, or if the insured prefer to pay any premium or premiums in full, the dividend or dividends will be applied to the purchase of paid-up additions to the policy.'

"But, as deceased did not pay his premium due in May, 1914, this dividend of $19.12, declared the previous December, was automatically credited on that premium, reducing it from $85.75 to $66.63, but still leaving the default. The fact that it was for a less amount does not destroy its force as a forfeiture.

"Plaintiff seeks to deal with this dividend as a separate and distinct payment of a premium for the purchase of extended insurance, carrying the life of the policy beyond the death of the insured. This would not be within the law, and would be outside the terms of the contract, for, as we have seen, it must be merely credited on the annual premium falling due next after the dividend is declared. But there is a provision in the policy that premiums may be paid annually, semi-annually, or quarterly, and it may be suggested that the dividend would apply as far as it would go as a quarterly payment. But the same answer could be made to this as has just been made to a full annual payment. The dividend was not sufficient to cover a quarterly payment, and if, without request from the assured, defendant had credited it as a quarterly

payment, it would still have left a default. If a quarterly payment was intended to be made, it, of course, should have been for a full quarter. The defendant could not be required to accept less (Terry v. Ins. Co., 90 S. C. 1, 72 S. E. 498).

"The fact that the lawmakers, in legislating on the subject of extended insurance, have failed to provide in terms that upon default in payment of premiums, when there were dividends declared but not paid or applied, the amount of such dividends should be used in the purchase of extended insurance, is apparently conclusive that it was not intended that they should be used for that purpose. The contract provides for only two uses of unpaid dividends, one as a credit on the next annual premium, and the other to purchase of additional insurance if the insured paid the annual premium in full; and we have seen that, as the insured did not pay the premium, the dividend could only be applied as a credit thereon."

In the case of Atlantic Life Insurance Company v. Bender (1926, Va.), 131 S. E. 806, dividend options were the same as those provided for in the policy involved in suit, but the dividends, under an automatic provision, had been applied to the purchase of paid-up additions to the policy. The policy lapsed upon the nonpayment of a premium, and after the death of the insured it was contended that the company should have used the dividends toward the purchase of term insurance. The Court held:

"This position is not tenable; the dividends had been applied according to the terms of the policies. * * *

"* * * Dividends and cash or loan values of life insurance policies do not belong to insurance unless created by statute or granted by the policies, and in

the latter instance **subject to the terms and conditions contained therein.''**

In Toncich v. Home Life Ins. Co. (1932, Pa.), 163 Atl. 673, a payment of $11.40 was due to the policyholder which, under the terms of the policy, might be applied in any one of various ways. But the purchase of term insurance was not one of such methods. The plaintiff claimed that nevertheless the sum should have been applied by the company to the purchase or provision of term insurance.

The Court said:

''On April 28, 1929, there was due a guaranteed coupon for $11.40 by virtue of a supplemental agreement as follows: 'On the second and each subsequent anniversary date of the policy, provided it be then in force, there will become due and payable in cash a coupon for the amount shown below. The insured, however, may select any one of the three following options: 1. To apply the coupon towards paying the premium then due, by surrendering it and paying in cash the full premium less the coupon.' The two remaining options are not material to this issue. Plaintiff argues that this $11.40 should have been applied by the company towards a further extension of the policy. The statement of claim contains no averment that insured made any effort to have the coupon so applied. In the absence of any indication by the holder of what should be done, and in view of the four possible dispositions of the coupon, it is difficult to see how appellant can now claim that the coupon had the effect of extending the insurance.''

Well-Understood Principles of Life Insurance.

While it seems to us unnecessary, yet for the possible convenience of the Court, particularly in the study of some cases which the petitioner has cited, it may be well to review briefly some of the well-understood principles of the life insurance business.

It is well known that insurance computations are based on mortality tables.

There are two such tables commonly used, namely, the American Experience Table of Mortality and the Actuaries' or Combined Experience Table of Mortality.

These tables do not differ greatly.

Each table, starting with approximately 100,000 lives at age 10, indicates how many die each year. According to each table, all die before age 100. The last three die at age 95, according to the first table, and the last one at age 99 according to the second table.

It is also well known that all computations are likewise based on an assumed rate of interest, such rate being now generally 3½ per cent.

In order that there may be common basis for calculations, American practice assumes that premiums are received at the beginning of the year, and that deaths occur at the end of the year.

Hence, given the exact dates when deaths will occur, and when premiums will be paid, and the exact interest return that will be regularly received and annually compounded, each dollar being immediately invested and kept invested until disbursed on account of death, and disregarding expenses and losses and all contingencies, it is

a simple mathematical problem to compute to the penny the amount of premiums that must be paid in order to meet the deaths as they occur.

These mathematically exact and requisite premiums are called "net premiums."

But as some additional charge is essential for expenses, a "loading" is placed on the net premium, and the sum constitutes the "gross premium."

It is well known that as the individual advances in age, the chance that he may die within the next twelve months increases each year. The mortality cost of insurance increases with each added year of age.

If the individual were charged each year a premium exactly sufficient, neither more nor less, to defray the mortality cost of his insurance for such year, the amount of the premium would increase from year to year.

But, as it has been found practically necessary or desirable that premiums be not thus increased from year to year, but be fixed at a level figure, it necessarily follows that this level figure must be greater than the mortality cost during the early years of the insurance, and less than the mortality cost during the later years of the insurance, the excess portions during the early years compensating for the deficits in the later years.

Hence, upon every level premium policy, the excess portions or savings, from premiums and interest, accumulate from the beginning.

If still, regardless of the insurer's actual experience with mortality cost and return on investments and expenses, it be assumed that deaths have occurred just as pointed out by the mortality table and that premiums have been

continuously invested at the assumed rate of interest, it is, as before, a mere mathematical problem to compute the accumulated savings, per $1,000 of insurance, at any date that may be desired.

The sums thus mathematically computed for $1,000 of insurance constitute the amount of the insurer's "reserve" against such policies.

The insurer is required by law, as a test of its solvency, to maintain such reserve. If its experience has been less favorable than the required standard of table of mortality and assumed rate of interest, the difference constitutes a loss in operation. If its experience has been more favorable than the required standard, the difference is a profit from operation, which may be distributed in the form of dividends.

These "reserve" amounts constitute that which has been paid in excess of the requirements of the assumed table of mortality and rate of interest, and thus represent to the policyholders the value of their policies.

In addition, the difference between the present worth, according to the table of mortality and the assumed rate of interest of all the premiums yet to be paid by a policyholder under his existing policy, and the present worth, similarly computed, of the premiums which he would have to pay on a new policy of the same type at his increased attained age, is exactly the amount of this "reserve."

The terms "reserve" and "value" or "net value" as applied to a policy are interchangeable. They designate precisely the same amounts.

As a test of its solvency, a life insurance company must

have on hand the amount of the "reserve" against its outstanding policies, or the "net value" of its outstanding policies, computed in accordance with the table of mortality and assumed rate of interest which it uses, or which has been adopted as a standard by statute.

In its statement of assets and liabilities, a life insurance company charges itself with a liability equivalent to the "reserve" against, or the "net value" of, its outstanding policies.

The loan values and cash surrender values of policies are fixed with reference to such "reserves" or "net values."

They are within the amount of the reserves or net values, but usually constitute the reserves or net values less a surrender charge varying in amount.

The surrender charge is made for the trouble of the transaction, and, also, for the injury to the company, by way of adverse selection of risks, involved in the surrender, it being thought that, as a general rule, only the good lives surrender their policies, whereas the impaired risks are certain to continue their policies in force to the end.

An insurance company may be able to invest its funds so as to yield more than the assumed rate of interest; also, it may select its policyholders in suchwise as to effect a mortality cost less than that of the assumed table of mortality. In each case the company makes a profit.

Also, it may effect a saving in expenses from the "loading" added to the net premium. Such savings augment its profit account.

From this profit account it declares dividends.

Thus, reserves and net values are entirely separate and distinct from dividends, and vice versa.

At intervals in the history of insurance, some one or more companies, particularly small companies desirous of "window-dressing" their policies to make them seem more attractive to the buyers, have issued policies containing provisions for the payment of "guaranteed dividends." These so-called "guaranteed dividends," sometimes represented by coupons, sometimes covered by a provision in the policy, are, in fact, misnomers. They are definite obligations for the payment of specific sums of money; and corresponding charges for them necessarily enter into the make-up of net premiums on the policies. For such obligations, as well as for the obligations to pay sums at death, the mathematically exact "net premiums" chargeable for the same, according to the adopted table of mortality and assumed rate of interest, of course may be computed, and, likewise, the "net value" or "reserve," as of any date, against such obligations. Both statute and company practice require the maintenance, as a test of solvency, at all times, of such "net value" or "reserve" against such contracts.

There are several well-known forms or types of insurance policies.

The first is the ordinary life type, which provides for the payment of premiums annually throughout life and for the face of the policy payable upon death.

Second, there is a limited payment type, which provides for the face of the policy to be payable at death, but for the payment of premiums for only a limited number of years, for instance, for five years, ten years, fifteen years, twenty years; such policies being commonly known as

five-pay policies, ten-pay policies, fifteen-pay policies, twenty-pay policies.

A third type of contract is the endowment type, which provides for the face of the policy to be payable at death, but also provides for the face of the policy to be payable at the end of a specified period of years, if this precedes death. Such period of years may be five, ten, fifteen or twenty years, and such policies are commonly known as five year endowment, ten year endowment, fifteen year endowment and twenty year endowment policies.

All of such policies—ordinary life, limited payment life and endowment policies—are issued at level premiums, and hence all accumulate reserves from the beginning.

The premiums upon these policies naturally differ.

The fewer the premiums payable, or the sooner the policy is payable, the greater the premium rate.

The premium on a ten year endowment contract is higher than the premium on a ten pay policy issued at the same age, and the latter is higher than the premium on an ordinary life policy at the same age.

Another type of insurance exists, designated as term insurance. Under this type the face of the insurance is payable only in the event death occurs within a specified term, usually short—one year, two years, etc. At the end of that term the policy is at an end. There is nothing left—no cash surrender value, no reserve. The amount of premium charged is just sufficient to discharge the mortality cost for the term.

In consequence the premium is extremely low. An individual rarely wishes to insure himself against the risk of death occuring solely within a short period of time.

He prefers a policy which he may maintain until he dies. Hence, little demand exists for the term policy.

Similarly, the insurance is unattractive to an insurance company. It involves the greatest amount of liability for the least premium. There is nothing from which unexpected mortality, losses in investments or expenses may be made good. It involves disproportionately heavy expense, in relation to the premium, to place the business on the books.

Hence, term insurance is not featured by any of the companies. Indeed, it is not offered generally on the market. It is reserved for writing to cover preferred risks in special circumstances.

Practically the function of term insurance is limited to its purchase with cash surrender values, upon default in premium payment, as a means of giving these values in some manner to the policyholders.

Where surrender values of ordinary life, limited payment life, or endowment policies are thus employed the ordinary life, limited payment life and endowment policies are not themselves extended, but they or their values are employed in the purchase of a different and cheaper form of insurance.

Computation of Insurance Reserves or Net Values and Premiums.

We may illustrate the computation of insurance reserves or net values as follows:

Let us take the tail end of the American Experience Table of Mortality. Of the 100,000 lives at age 10, with which the table starts, all have died by the beginning of

the age 90, save 847. According to this table, the number living and the number dying each year after age 90 are as follows:

Age	Number Surviving at Commencement of Year	Deaths During Year
90	847	385
91	462	246
92	216	137
93	79	58
94	21	18
95	3	3

Let us assume that the 847 persons living at the beginning of the year, age 90, take out each a policy of $1,000 on his life, payable at death, requiring the payment of premiums annually during life. Let us assume a rate of interest of 4½ per cent, and that the annual premium required from each is $494.32. In fact, the exact premium required is nearly one half of a cent greater than that, or about $494.32½.

It is to be remembered that in all American insurance calculations it is assumed that the premiums are paid at the beginning of the year, and that deaths occur at the end of the year.

Hence the 847 persons living at the beginning of the year, age 90, pay at that time premiums of 847 × 494.32, or $418,689. This sum, improved at 4½ per cent interest, amounts at the end of the year to $437,530. At that time, according to the table, 385 deaths occur, requiring the payment in policies of $385,000, and, after deducting this sum from the fund in hand, there is left $52,530. This balance is the exact sum which the policyholders have paid

in, plus the interest on the same, and less the cost of insurance for the year; and, as it is the saving or reserve on account of the policies of the 462 surviving members, the reserve of each policy is 1/462 of $52,530, or $113.70.

Now, this sum is not only the saving or reserve on account of each policy, but is also the exact difference between the payments that the member will thereafter have to make on his policy issued at age 90 and those which he would have to make on a new policy issued at age 91. That is to say, if he entered at age 91 the annual premium would be greater than $494.32, and the present worth of the excess of such future annual premiums over $494.32, the premium at age 90, is exactly $113.70. Hence this amount is both the reserve and the **value** of the policy at the end of the year, age 90; because it represents both what has been saved or reserved for the future on account of the policy and the difference between what the policy will cost in the future and what a new policy would cost. The two are always the same.

Starting at the beginning of the year, age 91, with a fund of $52,530, there is added to it immediately the premiums paid by the 462 surviving members (462 × 494.32), amounting to $228,376, and these two sums improved with 4½ per cent interest amount at the end of the year to $293,547. At that time, according to the table, 246 deaths occur, and $246,000 must be paid in policies, thus reducing the fund to $47,547. As this fund is now held on account of only 216 policies, the reserve, or net value, of each is 1/216 of $47,547, or $220.12.

At the beginning of the year, age 92, the 216 surviving members pay in premiums 216 × 494.32, or $106,773, and this, added to the balance of $47,547 at the end of the previous year, amounts to $154,320, and this sum, im-

proved with 4½ per cent interest, amounts at the end of the year to $161,264. At that time, according to the table, 137 deaths occur, and, therefore, $137,000 must be paid out in policies, leaving a balance in the fund of $24,264. As this fund is held on account of only 79 policies, the reserve or net value of each is 1-79 of $24,264, or $307.14.

At the beginning of the year, age 93, the balance of $24,264 is augmented by the premiums paid by the 79 members (79×494.32), amounting to $39,051, and these two sums, improved with 4½ per cent interest, amount at the end of the year to $66,165. At that time 58 deaths occur, and accordingly $58,000 must be paid in policies, reducing the fund to $8,165. But as this fund is held on account, now, of only 21 policies, the reserve, or net value, of each is 1-21 of $8,165, or $388.81.

At the beginning of the year, age 94, the balance of $8,165 is increased by the premiums paid by the 21 members (21×494.32), amounting to $10,381, and these two sums, improved with 4½ per cent interest, amount at the end of the year to $19,380. But, as 18 deaths then occur, requiring the payment of $18,000 in policies, the balance remaining is only $1,380. This sum, however, is held on account of only 3 policies, and, therefore, the reserve, or net value, of each is one-third of that amount, or $460.

At the beginning of the year, age 95, the three surviving members pay in premiums 3×494.32, or $1,482.96, and this sum, added to the balance of $1,380, makes a total fund in hand at the beginning of the year of $2,862.96. This sum, improved at 4½ per cent interest, amounts at the end of the year to $2,992, lacking only $8 of enough to discharge the $3,000 of policies maturing at that time. This difference of $8 is accounted for by the fact that we have used as the premium $494.32, whereas the amount is

more nearly $494.32½. In the calculations we have included 1,628 premiums, and a difference of one cent in the amount of each premium, that is, a premium of $494.33 instead of $494.32, would have increased the fund by $16.28, disregarding interest, thus producing a surplus, with interest, of probably $10.

The statement made above, that the net value of a policy is the difference between what it will cost the policyholder in the future and what a new policy would cost him, that is to say, the difference between the present worth of the premiums yet to be paid on the policy and those necessary to be paid on a new policy taken at the attained age, is applicable to a policy that has become paid up, as well as to a policy on which premiums are continuing. For instance, on a policy that has become paid up, the policyholder has no more premiums to pay, and, therefore, the net value of such a policy at any date is the present worth of the payments that he would then have to make on a new policy, or, which is the same thing, the single premium that he would then have to pay for a paid-up policy.

Article 3050 of the Revised Statutes of Texas of 1895, which was dropped from the statute in 1909 as unnecessary, though the term "net value" is continuously employed (Articles 4682, 4688, Revised Statutes of Texas, 1925), contains an accurate definition of "net value," as follows:

> "The net value of a policy at any time shall be taken to be the net single premium which will at that time effect the insurance, less the value at that time of the future net premiums called for by the table of mortality and rate of interest designated above."

Of course, where there are no premiums to be paid the

net value is the net single premium itself without deduction.

It may be well for us to illustrate here how annual premiums and net single premiums are determined. We have seen that an annual premium of $494.32 is just sufficient at age 90 to enable the company to pay the losses as they mature, in accordance with the table. But how is that figure ascertained?

Since the object is that the premiums and interest to be received shall just equal the losses to be paid, it is necessary to calculate at the beginning of the year, age 90, the present worth of all losses to be paid in the future and the number of premiums, or, rather, the present equivalent of the number of premiums, to be received in the future, and then to divide such equivalent number of premiums into the present worth of the losses, and the result must be the amount of each premium.

For instance, the present worth at the beginning of the year, age 90, of the losses to be paid in the future, each discounted at 4½ per cent compound interest, is as follows:

$385,000	to be paid in 1 year has present worth of	$368,421
246,000	to be paid in 2 years has present worth of	225,270
137,000	to be paid in 3 years has present worth of	120,053
58,000	to be paid in 4 years has present worth of	48,637
18,000	to be paid in 5 years has present worth of	14,444
3,000	to be paid in 6 years has present worth of	2,304
	Total present worth of losses.....	$779,129

Similarly, the equivalents now of the number of premiums to be paid in the future, such numbers being discounted at 4½ per cent compound interest, are as follows:

847 premiums to be received now are equal now to....	847	premiums
462 premiums to be received in 1 year are equal now to..	442.105356	premiums
216 premiums to be received in 2 years are equal now to.	197.797680	premiums
79 premiums to be received in 3 years are equal now to.	69.227463	premiums
21 premiums to be received in 4 years are equal now to.	17.609781	premiums
3 premiums to be received in 5 years are equal now to.	2.407353	premiums
Present equivalent of premiums to be received in future.....	1,576.147633	

The amount of each premium to be received, therefore, is ascertained by dividing $779,129, the present worth of the losses, by 1,576.147633, the present equivalent of the number of premiums, and the result is $494.3248, which is the amount of each annual premium.

The net single premium at age 90 for $1,000 of insurance is as easily calculated from the foregoing figures. Since the present worth of all the losses to be paid is $779,129, and since these losses cover the 847 lives in being at the beginning of the year, age 90, the single premium necessary to be paid by each to provide for such losses is 1/847 of $779,129, or $919.858.

Now, having ascertained how to compute the net single premium at any age, and how to obtain the present worth of premiums to be paid in the future on any policy, let us

Inquire whether the figure of $113.70, which we have seen is the reserve at the end of the first year of a policy issued at age 90, is also the difference between the present worth of all premiums remaining to be paid under the policy and the net single premium for new insurance taken at age 91.

The present worth of the losses to be paid after the end of the year, age 90, is as follows:

$246,000	to be paid in 1 year has present worth of	$235,407
137,000	to be paid in 2 years has present worth of	125,455
58,000	to be paid in 3 years has present worth of	50,825
18,000	to be paid in 4 years has present worth of	15,094
3,000	to be paid in 5 years has present worth of	2,407
	Total present worth of losses to be paid	$429,188

As these losses cover the 462 lives surviving at the end of year, age 90, the single premium necessary to be paid by each to provide for the losses would be 1 462 of $429,188, or $928.97.

New premiums would remain to be paid by the policyholders joining at age 90 as follows:

462 premiums immediately, being equal immediately to	462	premiums
216 premiums in 1 year being equal now to	206.698608	premiums
79 premiums in 2 years being equal now to	72.3426670	premiums
21 premiums in 3 years being equal now to	18.4022237	premiums
3 premiums in 4 years being equal now to	2.5155683	premiums
Present equivalent of number of premiums to be paid in future	761.9591198	premiums

As each of these premiums will be of the same amount previously fixed, to wit, $494.32, the present equivalent of the total amount to be paid will be 761.9591198 × 494.32, or $376,651. And, as there are 462 persons surviving at the end of the year, age 99, by whom these premiums are to be paid, the amount to be paid by each, that is to say, the present worth of the premiums to be paid by each, is 1/462 of $376,651, or $815.26.

Deducting this sum, $815.26, the present worth of the premiums to be paid by each policyholder, from $928.97, the net single premium at the attained age for new insurance, the difference is found to be $113.71, which is the net value of each policy at that time. This figure, it will be noted, is within one cent of the figure previously named as the reserve, the difference being due merely to the elimination of fractions.

Discussion of Petitioner's Authorities Under Point A.

Before discussing the authorities, let us say, with reference to the authorities cited by the petitioner under this and other points, that courts not familiar with the

principles and terminology of the insurance business sometimes have evinced confusion over insurance terms, and consequently have been guilty of some errors of expression in their opinions and also of some, though fewer, errors of substantive decision.

Not infrequently such errors on the part of the courts have been attributable to a lack of familiarity with insurance terms on the part of the attorneys representing insurance companies in the cases in which such errors have crept into the Court's opinions.

Further, it is proper to mention that some of the cases have to do with policy provisions that are variant from the normal, and some with insurance companies engaged in a different type of business from level premium or legal reserve life insurance.

Formerly, there were many "pure assessment" life insurance companies in existence, as distinguished from "legal reserve" or "level premium" life insurance companies. Afterwards, there sprang into existence many "quasi-assessment" life insurance companies, namely, companies that, instead of increasing the premium rate each year during the life of the policy (as did the "pure assessment" companies), had, without operating on a "level premium" or "legal reserve" basis, sought to avoid the stepping-up of the premiums each year, by charging a little more than necessary and stepping up the rates by five-year periods or other periods, and created some form of fund termed "safety fund," or "guaranty fund," or otherwise similarly designated, for the purpose of thus providing some semi-stability to the rates for a longer or shorter period.

Courts have been called upon to determine the applica-

tion of statutes to the terms of such irregular contracts. Occasionally, expressions in statutes have been expanded beyond their correct meaning in order to cover irregular contracts of this nature, which in truth and in spirit should be held coverable by such statutes.

But, when courts are dealing, as here, with the normal "level premium" or "legal reserve" contract, the terms of which are clear and definite, and the insurance expressions contained in which are correctly used, and are exactly in accord with the language of the statutes, in which insurance expressions are likewise correctly employed, the opinions in the irregular contract instances mentioned afford no ground for distorting stipulations or statutory provisions in order to award a judgment in favor of a plaintiff.

As already indicated, the instances are few in which there have been **errors of substantive decision.** Though a court may be unfamiliar with the principles and terminology of the business, and its opinion may contain errors of expression, the Court correctly senses the right and justice of the case.

Indeed, many errors have crept into the law and given rise to much difficulty for a time, because of confusion of thought and errors of expression in rendering decisions that morally were right, and legally also were right, but only were incorrectly or inartificially expressed.

The petitioner has cited two cases decided by circuit courts of appeal, one by the Sixth Circuit and one by the Fourth Circuit, in which this Court has refused writs of certiorari, and the motion for certiorari in this case primarily was based on the asserted conflict between the decision of the Circuit Court of Appeals in this case and the

decisions of other circuit courts of appeal in the two cases mentioned.

This Court in no way indicated by its refusal of certiorari in Atlantic Life Ins. Co. v. Pharr, 59 Fed. (2d) 1024, and Harvey v. Union Central Life Ins. Co., 45 Fed. (2d) 78, that it approved either the decision or the opinion in either of these cases.

The case of Atlantic Life Ins. Co. v. Pharr, 59 Fed. (2d) 1024, is essentially different in its policy provisions and in its facts from the case at bar. Indeed, in that case the policy provisions were variant from the normal. The claim and practice of the company in that case was that the dividend of $115.20 of June 16, 1927, was subject to the use of the insured only in the event the premium of June 16, 1927, was paid, and that if such premium was not paid the dividend was retainable by the company as its own property. The Court rejected this claim, both from a consideration of the dividend clauses of the policy and from the consideration that the company was a mutual company. Since the Court held that a sum was available for the benefit of the policyholder, for a definite or specific use of which the policy made no provision, the Court interpreted a rather general and obscure term in the policy, "the balance of value" (which, under a policy provision, would be applied to the purchase of extended insurance), as sufficient to include this additional value of $115.20, which the Court held was available, but which the company had unjustifiably attempted to claim and retain as its property. The term, "balance of value," appeared in a clause as follows:

> "If the available cash value be insufficient to pay an annual premium and interest as above stated, the

company will continue the contract as extended insurance for such time as the **balance of value** will permit."

The case at bar is radically different. Here the dividend was definitely payable, and the policy provided a definite, specific and unambiguous method of disposition of the same in the precise contingency that occurred, namely, the lapse of the policy. In such contingency, the dividend was payable in cash. The former policyholder submitted to the company an order directing the payment of this dividend in cash to a certain creditor, and the company paid the dividend in cash, in accordance with the order. The lapsed policy and the paid dividend were then closed transactions, and in such situation, with formal notice of the company's cessation of the insurance in an envelope in the policyholder's home, the policyholder died. This suit is brought in an attempt to nullify the payment of the dividend, upon the fanciful theory that the policyholder was then non compos mentis, and, upon the success of such nullification, to force an ex post facto application by the company of an equivalent amount, to the purchase, without contract, and contrary to contract, of term insurance, from a date long past to a date, as it had already happened, that included the death of the former policyholder.

Harvey v. Union Central Life Ins. Co., 45 Fed. (2d) 78, was by a divided court.

It involved the respondent's form of contract under an earlier edition, but the issue there decided is not involved in the case at bar.

The decision in the Harvey case was placed squarely on the ground that, in the circumstances of the case, the extended insurance ran, not from the valuation date fixed in

the policy, but from the time of delivery of the policy, and that, inasmuch as the term did not begin to run until the anniversary date after delivery, the extended insurance was in force at the death of the insured without reference to, and without taking into account, any dividend, in figuring the period of extended insurance.

That such was the decision of the Court appears from the following excerpt from the Court's opinion:

> "This shows conclusively that the mere fact of paying an annual premium in advance will not operate to penalize the insured by shortening the term of insurance to less than one year from the agreed date upon which the policy becomes effective and from which the policy year begins to run. The Court was in error in sustaining the contrary view and **must be reversed.**"
>
> "In view of this ruling, a determination of the other issues becomes somewhat unnecessary, and they will be discussed but briefly."

Having thus decided to reverse the judgment below, the Court, in taking up such other issues for casual discussion, intimated but without deciding and without any careful consideration, and without resting the decision on such point—that the dividend could have been used to increase further the term of extension, and added that "the company held two policy lien **notes**, and even if the dividend should have been paid in cash it was a creditor in possession with the right to apply the money to the reduction of the loan. * * *"

According to the opinion, there was actual indebtedness evidenced by "notes." The Court was not speaking of a policy loan agreement, such as we have in the case at bar. If the Court did have such a lien in mind, the statement of the Court that "it was a creditor in possession, with the

right to apply the money to the reduction of the loan," is clearly erroneous, being contrary in principle to the doctrine of Orleans Parish v. New York Life Ins. Co., 216 U. S. 517, as pointed out by the Circuit Court of Appeals (Tr., p. 227).

POINT B.

The 1931 dividend did not operate to purchase extended insurance under the provisions of Article 4732 of the Revised Statutes of Texas of 1925.

The petitioner's contention seems to be that a contractual obligation to pay the dividend of $74.80 of June 10, 1931, in cash to the policyholder, rather than to substitute therefor term insurance for a brief period in favor of the former policyholder's beneficiary, is in contravention of the Texas statute mentioned.

The statute contains the term "dividend addition," which corresponds with the term "paid-up addition" used in the policy.

The petitioner's contention is that the dividend of June 10, 1931, should be treated as if included in the term "dividend addition."

Though subdivision 7 of the statute is the one presented by the petitioner, yet the term "dividend addition" is repeatedly used in both subdivisions 6 and 7 and consequently we set both forth with such explanatory matter as is deemed proper, as follows:

Statute.	**Explanatory Matter.**
"Art. 4732. Policy shall contain what.—No policy of life insurance shall be is-	

Statute.	Explanatory Matter.
sued or delivered in this state, or be issued by a life insurance company organized under the laws of this state, unless the same shall contain provisions substantially as follows: • • • "6. That after three full years premiums have been paid, the company at any time while the policy is in force, will advance upon proper assignment of the policy and upon the sole security thereof	The statutory requirement that the advance shall be upon the **sole security** of the policy doubtless precludes any attempt by a company to demand the personal obligation of the policyholder to repay the amount received from the company. The policy provision in the present instance is for a loan "on the sole security of the policy, on assignment thereof" (Tr., p. 87, Art. 19); and the loan agreement consists merely of an acknowledgment of the sum received from the company and an assignment of the policy as security therefor, with a stipulation that if and when the amount received from the company,

Statute.	Explanatory Matter.
	with interest, shall exceed the cash surrender value of the policy, thereupon the insurance shall cease (Tr., pp. 91-92).
at a specified rate of interest a sum equal to, or at the option of the owner of the policy less than,	
the legal reserve at the end of the current policy year on the policy and on any dividend addition thereto.	Observe the expressions "legal reserve" and "dividend addition" so often hereinbefore referred to. The legislative use of these terms implies and makes necessary complete familiarity with the same on the part of the courts. That which the legislature takes cognizance of and requires that the courts shall interpret, courts also must take cognizance of. "Dividend addition," according to the uncontradicted evidence, means, and always has meant, just one thing, namely, a paid-up addition to the policy purchased with a dividend. It could not mean the dividend itself. A dividend declared immediately payable in cash, or disposable in cash according to some option of the policyholder, is utterly in-

Statute.	Explanatory Matter.
	consistent with a provision for borrowing such dividend. Also, it is inconsistent with "additions to the policy," which implies something permanently added to the policy. Also, it is inconsistent with "legal reserve on * * * dividend additions," because no legal reserve exists on a dividend. Indeed, "dividend additions" can mean nothing other than that which the uncontradicted evidence of the actuaries indicates namely, a paid up addition to the policy purchased with a dividend. On such a paid up addition there is, of course, a "legal reserve," as the explanation hereinbefore given of the reserve or net value of a policy shows.
less than a sum not more than two and one-half per cent of the amount insured by the policy, and of any dividend additions thereto; and	Here it will be observed a surrender charge is permitted of $2\frac{1}{2}$ per cent of not only the face amount of the policy, but also the face amount "of any dividend additions thereto." This second use of the term "dividend additions" likewise indicates its similarity in nature to "the amount insured by the policy." If

Statute.

that the company may deduct from such loan value any existing indebtedness on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year, which provision may also provide that such loans may be deferred for not exceeding six months after application therefor is made. It shall also be stipulated in the policy that failure to repay any such advance, or to pay interest, shall not void the policy until the total indebtedness thereon to the company shall equal or exceed the loan value. No condition other than as herein provided shall be exacted as a prerequisite to any such advance.

Explanatory Matter.

the policy is of $10,000 and the dividend addition is of $152, the permitted surrender charge is 2½ per cent of $10,152. This expression plainly shows that the dividend addition is an increased amount of insurance added to the face of the policy.

Statute.	Explanatory Matter.
This provision shall not be required in term insurances, nor in pure endowments issued or granted as original policies, or in exchange for lapsed or surrendered policies.	Here also is legislative recognition of the type of insurance hereinbefore referred to as "term insurance," also of the fact that such type of insurance is radically different from other types referred to. While a paid up term insurance, such as is purchased with the cash surrender value of a lapsed or surrendered policy, has a reserve or net value, that reserve or net value is continuously depleted during the term, and by the end of the term is entirely exhausted. The reserve on such a policy covers merely the mortality cost of the insurance during the term. When the term expires the insurance is at an end. It has no reserve, no cash surrender value indeed, nothing.
No provision herein shall compel any company to loan on any policy an amount greater than ninety-seven and one-half per centum of the face value thereof, including net dividend additions thereto.	This provision merely makes certain, by repetition the permitted surrender charge of $2\frac{1}{2}$ per cent of the amount insured by the policy and of any dividend additions thereto. This third use of the term "dividend additions" again clearly indicates that it constitutes

Statute.	Explanatory Matter.
	additional insurance purchased with a dividend, just as the uncontradicted evidence in the case shows.
"7. A provision which, in event of default in premium payments, after premiums shall have been paid for three full years,	This subdivision is the subdivision on which the plaintiff relies. The prior subdivision just quoted relates to loans on policies. This subdivision relates to premium defaults.
shall secure to the owner of the policy a stipulated form of insurance,	Observe that the requirement is merely for: **a** or **some** "stipulated form of insurance" not necessarily "term insurance"; indeed, not any form specified by the legislature but rather on the contrary **any form that may be stipulated by the parties.** A paid-up addition to the policy is a form of insurance, and this, as a rule, is the stipulated form. This was the form of insurance stipulated in the present case by the fourth subdivision of Article 11 (Dividend options) hereinbefore copied. The policy provision so stipulating is in exact compliance with the statute.
the net value of which shall be at least equal to the re-	Here again are legislative employments of the terms

Statute.	Explanatory Matter.
serve at the date of default on the policy,	"net value" and "reserve" so often hereinbefore referred to. The reserve (less surrender charge covered by a subsequent clause) is to be used to purchase the "stipulated form of insurance," and the effect of this clause is to prevent the insurer from imposing any loading or charge for expenses for its issuance of the "stipulated form of insurance" because the "net value" of the "stipulated form of insurance" must not be less than the "reserve" purchasing the same. Hence the "stipulated form of insurance" is to be acquired solely for the net premium mathematically requisite to be charged for such insurance as hereinbefore explained, and such net premium at the issuance of the stipulated form of insurance is exactly the net value of the stipulated form of insurance at such time.
and on any dividend additions thereto,	This is the expression which the plaintiff contends includes the dividend of June 10, 1931. The plaintiff's contention, as hereinbefore often explained, is

Statute.	Explanatory Matter.
	that a dividend should be treated as a "dividend addition" whereas it plainly appears from the uncontradicted evidence and from the repeated use of this same term "dividend additions" in subdivision 6 of the statute hereinbefore copied; that the term "dividend additions" means and always has meant, in the insurance business, merely paid up additions to the policy purchased with dividends.
specifying the mortality table and rate of interest adopted for computing such reserve,	Here again is evidence of legislative familiarity with the fact that "reserves" are computed in accordance with an adopted mortality table and rate of interest.
less a sum not more than two and one half per cent of the amount insured by the policy, and of any existing dividend additions thereto,	Here again is legislative permission that there may be deducted from the reserve, as a surrender charge, 2½ per cent of the amount insured by the policy and also of any existing dividend additions thereto. Two and one-half per cent of $10,000, the face of the policy in question, is $250. This was the legally permissible surrender charge. The

Statute.	Explanatory Matter.
	surrender charge employed by the defendant was only $60. Here also in this the fifth use of the term "dividend additions" in subdivisions 6 and 7, it appears again that dividend additions correspond to the amount insured by the policy, that, in other words, dividend additions are additional amounts of insurance purchased by dividends just as the uncontradicted evidence shows.
and less any existing indebtedness to the company on the policy;	Here is legislative permission that indebtedness to the company on the policy may be deducted from the reserve.
Such provision shall stipulate that the policy may be surrendered to the company at its home office within one month from date of default for a specified cash value at least equal to the sum which would otherwise be available for the purchase of insurance, as aforesaid,	Here is merely a provision that the cash surrender value shall be payable in cash on surrender of the policy within one month from date of default.
and may stipulate that the company may defer payment for not more than six months after the application therefor is made.	

Statute.	Explanatory Matter.
This provision shall not be required in term insurances."	Here again is legislative recognition of the radical difference between "term insurances" and other insurances as hereinbefore explained.

No argument seems necessary to expose the error of the petitioner's contention that a dividend declared and ready for payment is a "dividend addition" to the policy. The uncontradicted evidence of the two actuaries offered by the respondent conclusively establishes the one meaning which the term "dividend additions" has and always has had among those engaged in the insurance business (pp. 24-25, ante).

Indeed, no court familiar with the principles of such business could entertain, for a moment, any other idea of the term.

But courts cannot be omniscient, and courts not familiar with the principles and terminology of the business sometimes have evinced confusion over insurance terms, and consequently have been guilty of some errors of expression in their opinions, and also of some, though fewer, errors of substantive decision.

But the business is of such great importance in the national economy and it so intimately affects substantially the whole of the population, that the greatest importance exists that its principles and terminology be clearly understood whenever a subject matter is involved that affects, in principle, not one policyholder only, and not one contract only, but the entire business.

A question sometimes has been suggested whether an

attempt should not be made by witnesses to develop, upon the trial of a case, a full explanation of the principles and of the terminology of the business. But the frequency with which a familiarity with such principles and terminology is required for the determination of controversies precludes the introduction of such evidence on each occasion, and the crowded condition of trial court dockets and the circumstances surrounding trials in courts of first instance are quite unfavorable for the introduction of such evidence on any occasion. Indeed, in any case, offered evidence of such character, unless quite limited in its scope (as was the evidence of the actuaries here such evidence being limited to the signification of the terms "dividend additions" and "paid up additions" the issue regarding the same being the only issue intimated on the plaintiff's pleading) would certainly be excluded by the trial judge as irrelevant to any issue in the case.

But the frequency of insurance controversies requiring a familiarity with the principles and terminology of the business, and the vast number of people affected by the business undoubtedly bring such principles and terminology within the realm of judicial knowledge.

And, indeed, the legislative use of insurance terms, which it is the duty of the courts to interpret, makes it necessary for the courts at all times to have a familiarity with the principles and the terminology of the business.

Returning to the subject of the statute presented by the plaintiff, we quote from the Supreme Court of Texas in Gilley v. Missouri State Life Insurance Company, 116 Tex. 43, 49, 50, 273 S. W. 825, 285 S. W. 807, as follows:

> "The provision of the law which requires that the policy shall secure to the owners a stipulated form

> of insurance, whether paid up or extended insurance, designates that such insurance shall be of a net value equal to the reserve to the date of default, less a sum not more than two and one half per cent of the amount insured by the policy. The law clearly recognizes the rule adopted by insurance companies, in arriving at the value of the reserve of policies, to first deduct from the excess in current premiums two and one half per cent of the amount of the policy in the nature of a carrying charge; and, if there be an amount left, it represents the real reserve, which may be used for the purpose of obtaining a loan, paid up insurance, or extended insurance, as the insured may elect. * * * If this two and one half per cent be deducted as the law contemplates, and as it must have actually been done by the company, the policy in fact had no reserve value at all."

Thus the Court said, in that case, if the permitted surrender charge of 2½ per cent were deducted from the amount which otherwise was required by law to be paid in cash to the policyholder, or used to purchase a stipulated form of insurance, there was nothing left, and that the statute was inapplicable to the circumstances.

The same condition existed here, even if the plaintiff be indulged in the whole of his contention. In other words, if a computation is made of the figures involved in his contention it will be found that the statute is nugatory, for that if the dividend of $74.80 be added to the entire reserve of $970.00, a sum is obtained of $1,044.80, and if from this sum be deducted the statutorily permitted surrender charge of $250.00, a difference is obtained of $794.80, and if an attempt be then made to discharge with this sum the indebtedness of $898.88, it is found that the sum lacks $104.08 of meeting the indebted-

ness, and, of course, leaves absolutely nothing for payment in cash or for use in purchasing any form of stipulated insurance.

Discussion of Petitioner's Authorities Under Point B.

Great Southern Life Ins. Co. v. Jones, 35 Fed. (2d) 122, involved a twenty-pay policy, which made no provision for dividends, but which had attached to it nineteen so-called premium reduction coupons, maturing one each year so long as the premiums should be paid. Each coupon was a promise by the company that it would pay the amount stated therein in any one of several optional settlements. Such options were similar to usual dividend options. Eleven annual premiums were paid, but the twelfth premium was not paid. The Court found that "the premium reduction coupons on December 24, 1921 (twelfth anniversary of the policy), had a then guaranteed cash value of $425.50 due the insured at the time of his death."

The Court confused "coupons," the payment of which was guaranteed, and which constituted, therefore, a fixed liability of the company, to meet which a reserve must be provided (see pp. 44-46, ante), with "dividends," which are declarable only out of surplus, when, "by reason of good management, good risks, or the like, the insurer's business shows results above death losses, expenses and reserves" (Tr., p. 224). The Court then proceeded to confuse "dividends" with "dividend additions." An Oklahoma statute required that each policy issued should provide for a stipulated form of insurance, the net value of which should be at least equal to the reserve at the date of default on the policy and on dividend additions thereto, if any, less any existing indebtedness to the company.

The Court, guilty of error of expression, due to a lack

of familiarity with the principles of the insurance business, could have reached the same result had it known that a reserve according to the assumed mortality table and rate of interest was kept, and was required to be kept, under fundamental principles of insurance hereinbefore discussed, to meet not only the face amount of the insurance as a death benefit, but also each maturing coupon attached to the policy.

At the trial of the case at bar, the petitioner used an actuary as a witness in her behalf, but this witness was not asked by her to testify as to the meaning of the term "dividend addition," although two actuaries, placed on the stand by the respondent, had testified that the term has, and always has had, but one meaning, to wit, the amount of insurance purchased with a dividend and added to the face of the policy. The reason that the petitioner's actuary did not contradict these witnesses was, of course, the single, well-understood and undeniable meaning of the term in insurance parlance.

First Texas State Ins. Co. v. Smalley, 111 Tex. 68, 228 S. W. 550, and Occidental Life Ins. Co. v. Jamora, T. C. A., 44 S. W. (2d) 808, are cited as interpreting the term "dividend additions" as meaning "dividends." But in neither case did the policy make provision for dividends, and in neither case was the Court attempting to arrive at the meaning of the term "dividend additions."

United States Life Ins. Co. v. Spinks (Ky.), 96 S. W. 889, 103 S. W. 335, is a case from Kentucky, the courts of which, notoriously among the insurance fraternity, have displayed a lack of familiarity with the principles and terminology of the business, and an erratic and conflicting course of decision which even the bar of that state recog-

nizes. The policy in that case contained a provision with reference to dividend, as follows:

> "The said company agrees, in case the life insured survive to the end of the specified period, if this policy be then in full force, to pay to the legal holder or holder of this policy the dividend apportioned to this policy from its profits by said company."

Four annual premiums were paid, but the fifth premium was not paid, and the insured and the beneficiary requested the company in writing to apply "the entire reserve on the policy, including dividend additions, if any," to the purchase of nonparticipating extended insurance. Pursuant to such request, the company delivered a certificate of extended insurance expiring in August, 1898, and the insured died in September, 1898.

Suit was brought on the theory that out of the surplus there was applicable to the policy a sum sufficient to increase the term of extension beyond the date of the death of the insured. Because the controlling New York statute required the nonforfeitable reserve to include a sum on account of "dividend additions," and because the Court thought that a dividend was a dividend addition, and because the provision in the policy with reference to a dividend, so the Court thought, did not exclude the participation of the policy in the accumulated surplus, the Court took the position that a sufficient share of the surplus was available to increase the term of extended insurance beyond the date of the death of the insured.

This was a badly handled and badly decided case, the insurance company changing its position at different times during the progress of the proceedings.

The Court appears to have been influenced by what it

considered either the insincerity, or the ignorance, or both, that characterized the presentation of the defense.

The Court merely defined the expression "dividend additions" as used in the New York statute.

A few years later the same Court had occasion to define the same words appearing in a contract, and it then distinguished the Spinks case, and held that without doubt the expression "dividend additions" meant "additions to the insurance from the dividends declared by the company" (Mutual Benefit Life Ins. Co. v. O'Brien [Ky.], 116 S. W. 750). Still later, the same Court had occasion to define the same expression, "dividend additions," appearing in a Kentucky statute, and said:

> "It means something added to the policy in the shape or form of paid-up insurance. * * * It in no sense represents unapportioned assets, or surplus, of the company, but has reference solely to paid-up insurance" (Jefferson v. New York Life Ins. Co., 151 Ky. 609, 152 S. W. 780).

POINT C.

The policyholder possessed no contractual or statutory right that the 1931 dividend should be applied by the company to the purchase of term insurance, nor did the policyholder ever request that it be so applied.

The petitioner contends, under point C, that the policyholder "had the right to have (the 1931 dividend) applied to provide for extended insurance," and "timely directed that it be so applied."

In support of the right, she contends that the current dividend, declared and payable only on June 10, 1931,

constituted "accumulations of dividends at interest" within the meaning of article 17 of the policy (Division 3 thereof, copied and commented on at pages 17-18, ante). Such accumulations of dividends, as indicated by our comments on the prior page of this brief, are accumulations as a result of the exercise by the policyholders of the option (under the third division of article 11 of the policy, page 10, ante) to leave dividends with the company to accumulate at 3 per cent interest, etc., until the maturity of the policy. But here the undisputed evidence is that all prior dividends, namely, those of 1928, 1929 and 1930, had been used to minimize the necessary cash premium payment, and that none of such dividends had been left with the company at interest, and no such election had been exercised by the policyholder.

As for the claimed timely direction by the policyholder that the dividend be applied to the purchase of term insurance, the petitioner again brings forward, as sole justification for such claim, the reference in the letter of Lee & Lee to the company of September 14, 1931, to a conversation between their local agent at San Angelo and the former insured on September 1, 1931. Such reference in such letter does not concern any application of dividend on the policy in suit to the purchase of term insurance. It has reference to a proposed plan of obtaining from the company whatever moneys the former insured might be entitled to, and using such moneys in the restoration and carrying of $15,000 of insurance (a small portion of the insurance which he had been carrying), and also, according to the proposal, making some payment to Lee & Lee on the note to them of $1,643.63. The former insured expressed his unwillingness, according to the reference, that any portion of the money should go to Lee & Lee.

No mention was made of term insurance. No policy was identified. And the conversation occurred long after July 11, 1931, the expiration of the days of grace, when the insurance had terminated and the rights of the parties had become fixed.

As said by the Circuit Court of Appeals:

> "The agents in their letter of September 14th communicated to the company that on September 1st Williams, in rejecting the negotiations and refusing to pay anything to the agents, had said he wanted every nickel applied to carrying the policies. There were seven policies involved. This statement was too indefinite to serve as a direction to apply this dividend in any particular way. Moreover, it was too late for him to apply it to extend this policy, for it had become void on July 11th, and could only be reinstated on payment of the premium with interest and satisfactory medical examination, and Williams since August 16 had been an ill man" (Tr., p. 228).

POINT D.

The respondent's contractual obligation with reference to the 1931 dividend being to pay the same in cash to the policyholder, the company owed no duty and possessed no right, even though it so desired, to apply the dividend as a credit on, or in reduction of, the policy lien.

The policy lien was not indebtedness of the policyholder. The policyholder did not owe the lien. The instrument was not enforceable against the policyholder personally. It constituted a mere lien on the policy.

Mr. Justice Holmes, in Orleans Parish v. New York Life Ins. Co., 216 U. S. 517, said:

> "The so called liability of the policyholder never exists as a personal liability; it never is a debt, but is merely a deduction in account from the sum that the plaintiffs (the insurance companies) ultimately must pay. In settling that account, interest will be computed on the item for the reason that we have mentioned, but the item never could be sued for, any more than any other single item of a mutual account that always shows a balance against the would be plaintiff. In form it subsists as an item until the settlement, because interest must be charged on it. **In substance it is extinct from the beginning,** because, as was said by the judge below, **it is a payment, not a loan.**"

Wagner v. Thieriot, 197 N. Y. S. 560, affirmed by the New York Court of Appeals, 142 N. E. 295, is to the same effect.

The policy lien not only did not affect the policyholder personally, but it constituted no threat at the time to the existence and continuance of the insurance. The only immediate threat to such continuance was the nonpayment of the current premium.

Yet it is claimed that, without request, the company should have applied the dividend to the reduction of the policy lien.

The desire to apply the dividend on a mere lien, not a personal obligation, in the case of a lapsing policy would be most extraordinary. It would not be the natural or expected expression of ordinary human nature.

A policyholder who voluntarily relinquishes a policy of insurance, or who is compelled by financial necessity to relinquish a policy of insurance, may profit more from a cash payment, though small (here it amounted to several

hundred dollars for all policies), than from either the reduction of a policy lien which he does not owe, or a substituted insurance contract continuing for only a very brief period.

Especially may he so profit if, as here, he may receive the dividend (Tr., p. 89); whereas the substituted insurance contract advantages only his beneficiary.

See also discussion on pages 29-32, ante.

POINT E.

The undisputed evidence established, and the petitioner's own pleadings asserted, that the 1931 dividend was paid in cash, on the policyholder's written order, to specified creditors of his, prior to his death, and was not applied to the purchase of term insurance; and there is neither allegation nor proof on the part of petitioner of any statement by the company, or of reliance on any statement of the company, that it had been applied to the purchase of term insurance, on which to found the petitioner's present claim of estoppel.

Petitioner's point E indicates a peculiarly warped viewpoint. She says that the respondent "is estopped to say that the 1931 dividend was not applied to provide for insurance."

She herself alleges in her pleadings that her husband gave Lee & Lee an order on the company to pay the dividend to them, and that the company did pay it to them; and she offers in her pleadings to restore the sum to the company. She seeks to avoid these facts not by denying them, or by saying that the company represented that it had applied the dividend to the purchase of term insur-

ance but by alleging that her husband was non compos mentis at the time. She makes, in her pleadings, no claim of misstatement by the company, of reliance thereon, and of consequent estoppel (Tr., pp. 61 68).

Petitioner brings forward, apparently in support of the claimed estoppel, the premium notice of June 10, 1931, the reference in Lee & Lee's letter to the company of September 14, 1931, to the conversation of September 1st between their local agent and the former policyholder, and whatever criticism of the company, of jury consumption nature, she can conceive of. The premium notice and the letter have been sufficiently discussed on prior pages of this brief.

The insurance having ceased on July 11, 1931 but the company having sent to Lee & Lee on July 15, 1931, a memorandum of figures for use in enabling Lee & Lee to work out some plan with the former policyholder, such as the obtaining from the company of all sums payable by it under all the policies, and the restoration and continuance of some small portion of the insurance (mentioned in Lee & Lee's letter of September 14, 1931, as $15,000) the company naturally deferred the transmission of a check for the dividends on this and other policies until reasonable opportunity had been afforded to work out some such plan. But nothing having been accomplished, the company, on September 9, 1931, issued its check in favor of the former policyholder for the dividends, and transmitted the same to Lee & Lee for delivery. The check was returned with the agents' letter of September 14, 1931, and within a few days the company received the written order of the former policyholder, of September 18, 1931, directing payment of the dividends to Lee & Lee. Thereupon, in due course, on September 28, 1931, it issued its check in accordance with the order.

The former policyholder was under no misapprehension regarding the status of his insurance. The petitioner says that he was informed by Lee & Lee's representative that his insurance had ceased. The written order which he signed on September 18, 1931, referred to the policies as lapsed; and the company formally advised him on October 7, 1931, that all insurance had terminated. The company at no time after July 11th indicated to him that his policies were in effect, and no claim of that nature is asserted in the pleadings of the plaintiff.

The note taken by Lee & Lee's representative on September 18, 1931, for $914.77, was simply a note for the difference between the note of $1,643.63, which Lee & Lee held, and the dividends which Williams directed to be paid to them. In exchange for the order and the new note, the note of $1,643.63 was canceled and delivered to Williams, and was produced by the petitioner at the trial. Such note, as delivered to Williams, and as produced at the trial by the petitioner, had written across its face:

> "Renewed by new note for $914.77 this 18th day Sept. & cash of $852.10" (Tr. pp. 155, 150).

POINT F.

The insurance terminated ipso facto at the expiration of the days of grace on July 11, 1931. No notice by the company of such termination was necessary.

The petitioner claims that the insurance did not terminate ipso facto, but that under article 19 of the policy a formal notice was necessary. This article has reference to a termination of the insurance for failure to repay an advance, or interest thereon, secured by the policy. When such advances and interest, in the aggregate, exceed the

loan value, then, for failure to pay interest there may be a termination of the insurance, but only after one month's notice by the company to the insured (Tr., p. 87).

But in the present case the termination occurred, not in consequence of such a condition, but by reason of failure to pay the premium of June 10, 1931. Clearly, under the contract, the termination of the insurance for failure to pay the premium occurred ipso facto on July 11, 1931, the expiration of the days of grace.

REPLY TO PETITIONER'S POINTS 1, 2 AND 3.

POINT 1.

The pretended evidence of mental incompetency was without probative force to raise an issue of mental incompetency for submission to the jury. The payment of the dividend by the company, in accordance with the former policyholder's order of September 18, 1931, was effectual to discharge the company's obligation to such former policyholder.

Statement.

The issue as to mental competency was not passed upon by the Circuit Court of Appeals, as it held that under a proper interpretation of the insurance company's contractual obligations, there was no liability for insurance of any character after July 11, 1931, the last day of grace. Under the doctrine of **American Surety Co. v. Marotta**, 287 U. S. 513, 518, we do not suppose that the Court will pass upon such issue, but rather, if it should not affirm the decision of the Circuit Court of Appeals, we assume that the case would be remanded to such court for further consideration. Nevertheless, as the petitioner presents her contentions as to the issue of mental competency, we shall answer the same by substantially reproducing the contentions made by us in the Circuit Court of Appeals.

The preliminary statement in petitioner's supplemental brief, pages 3 and 4, as to the terms of the order executed by the former policyholder, and as to how George Lee, as attorney for Lee & Lee, the insurance company's agent at Dallas, happened to go to San Angelo to obtain it, may be

accepted as correct with one exception. There is no evidence to support the petitioner's statement that Lee & Lee tried to induce the former policyholder to surrender all of his policies and to transfer to Lee & Lee all sums accruing to him under such policies. With reference to that matter, the Court correctly found:

> "The general agents sought to interest him (Williams) in an arrangement by which he might surrender this and other policies which he had with the company, so as to pay the premium on and the loan against one of $15,000.00, and pay them $500.00 on their note, * * * but on September 4, Williams definitely refused the arrangement * * *."

The petitioner does not purport to make an adequate summary of what took place at the meeting between Lee & Lee's representative and the former policyholder on September 18, 1931, or of what the evidence was in support of or against her post mortem fancy of her husband's mental incompetency. We submit, therefore, the following statement:

On September 18, 1931, George Lee, attorney for Lee & Lee, went to San Angelo and there met his brother in law, Hervey Humlong, a resident of San Angelo, engaged in the ranching and gravel businesses. Williams was on his ranch at the time, about forty-five minutes from San Angelo by automobile. Between 10 and 10:30 in the morning George Lee and Humlong left San Angelo for the ranch, and when they arrived at the ranch they knocked on the front door of Williams' home, but no one responded to the knock. The two then drove further up the ranch, in the direction given them by Mexicans working on the ranch, for finding Williams. Unable to locate him, they returned by way of the ranch house, and this time Williams went to

the door fully dressed and admitted them to the front room of the house, where, according to these two witnesses, a conversation of from half an hour to forty five minutes, or even possibly an hour, took place. George Lee told Williams that he had come to ask Williams to execute an instrument releasing the dividends on his policies to Lee & Lee in order that they might be credited on the note that he had given to Lee & Lee for the advances on previous premiums (Tr., pp. 149, 150, 145, 146).

Williams replied that he was "peeved" at the company and did not wish to sign the instrument. He said that he was entitled to the dividends, that he did not think he had been treated fairly, and that he didn't feel like giving those dividends to Lee & Lee, although he admitted his indebtedness to Lee & Lee (Tr., pp. 150, 152).

George Lee argued that the dividends really ought to go to Lee & Lee, and that Williams was morally bound to transfer them to Lee & Lee, but advised Williams that the dividends belonged to him unless he was willing to transfer them to Lee & Lee (Tr., pp. 152, 155).

Realizing that Williams was rather irritable and discourteous, and that George Lee was not making much headway with his argument with Williams in the latter's then frame of mind, Humlong injected himself into the conversation, and began to talk with Williams about other matters. As both were interested in ranching and in the oil business, Humlong directed the conversation to such topics. Williams told Humlong where he got his herd of cattle, how he was trying to build it up, and how proud he was of it. He also mentioned that he had a large amount of oats stored in his bins that he was holding for a better price. Gradually Williams got into a better

frame of mind, and George Lee renewed his request and repeated his arguments (Tr., pp. 155-157, 146, 147).

Finally, Williams said, "Well, there is nothing to do, I guess, but to sign this thing, but I am sore about it." Thereupon he signed the order directing the payment of the dividends to Lee & Lee which is set forth on page 150 of the transcript. Williams never did get to where he was delighted to sign the instrument. According to George Lee, Williams did not jump at the opportunity, but gave his consent rather reluctantly. But Williams' attitude had changed from one of hostility to one of pleasantness and courtesy. He walked with Humlong and George Lee to the front gate, where their automobile was parked, and again engaged in more conversation about cattle and such matters (Tr., pp. 156, 146-148).

During the course of the conversation Williams told George Lee and Humlong that he had had his teeth extracted "recently" according to Lee, "the day before" according to Humlong, and he was expectorating some during the conversation, but neither saw him spit up blood. They did not examine the sputum to see whether it was tinged with blood. In the beginning he said that he had been losing sleep and was not feeling well, on account of having had his teeth pulled, and that his gums were swollen. But before they parted he was feeling a whole lot better (Tr., pp. 147, 155).

George Lee testified that Williams understood thoroughly that it was the dividends on all of his policies that he was directing the payment of to Lee & Lee (Tr., p. 152). Williams said that he was not suffering pain, though his teeth had given him some trouble, that his gums were swollen, and that he could talk only with difficulty. Williams did not show that he was in any pain (Tr., p. 153).

When asked as to the state of Williams' mind, George Lee stated:

> "I did not notice any variation in the intelligence of Mr. Williams' conversation at any time. He seemed to me to be perfectly rational all the way through. I did not notice his closing his eyes or being drowsy or outwardly manifesting any sleepiness. I did not notice any peculiar or unusual, abnormal expression out of his eyes" (Tr., p. 157).

Asked whether he made any observation as to Williams' mental condition during the course of the conversation, Lee replied: "Yes, sir; I observed him very closely." Asked as to what his observation was as to Williams' mental condition, Lee said: "Well, he appeared perfectly normal." The witness observed no forgetfulness on Williams' part and no lack of understanding of the conversation. On the contrary, he testified that Williams seemed to understand the whole conversation, and that he talked rationally (Tr., pp. 151-152).

Likewise, Humlong testified that he did not observe anything in Williams' conversation or in any talk on his part that was irrational. Humlong did not observe any forgetfulness on Williams' part or any unnatural or peculiar look out of the eyes (Tr., p. 147).

The only other two witnesses to testify as to what happened while Lee and Humlong were on the ranch that morning were Mrs. Williams, now the petitioner, and a hired hand on the ranch, Jeff Jordan.

Mrs. Williams testified that the conversation with Lee and Humlong lasted, "anyway, two hours" (Tr., p. 106). One cannot read her testimony, however, without being impressed that Mrs. Williams had a natural bent for exaggeration.

Mrs. Williams was in the dining room, kitchen and back porch, engaged in preparing dinner. She did not pay any attention to the conversation until she heard the name "Poteet" repeated several times, and she knew by that that they were talking about life insurance.

To use her own words, all else that she heard of the conversation was as follows:

> "One man would talk, and then the other would talk. One would say, 'It is this way, Mr. Williams,' and they would talk and talk. Then Mr. Williams would say, 'Well, gentlemen, I am a sick man today; I am not able to do anything today. I will be in town in a few days and see you there.' About the time he would get the sentence halfway out, the other man would start up and say, 'But this is how it is, Mr. Williams,' and by that time the other man would come in."

She knew that the two strangers called to discuss business with her husband. She knew that her husband was discussing business with them. It never occurred to her to enter the room in which the strangers were discussing business with her husband and to inform them that her husband was mentally incompetent and unable to discuss business with them. Nor did it occur to her to interfere with her husband or to dissuade him from transacting business. It did not occur to her that he needed any assistance in the transaction of business. Indeed, she did not testify that lack of mental capacity existed at any time.

In response to an inquiry as to whether she heard her husband say that he would sign, or was willing to sign, Mrs. Williams replied: "I didn't know there was anything concerning signing; I just heard them say those words.

Every sentence he would start, he would tell them he was a sick man and was not able to talk to them?" (Tr., p. 106).

The house was a small five-room house, the living room being about ten by twenty feet, and each of the other rooms about ten by ten feet. As it was a hot day, everything was open, and Mrs. Williams, from where she was working, saw her husband sitting in a big rocking chair, "kinda stooped down this way" part of the time, and part of the time moving around. A little after the two men left she went in there and found that Mr. Williams was "just slumped down in his chair, like this, down and out." She took him by the arm and helped him up. He said that he did not want any dinner, but she insisted that he take some coffee, which he just tasted. He sat down on the bed and took "some aspirins." She took his temperature, and found that it was between 102 and 103 (Tr., pp. 106-107).

Jeff Jordan came into the house at noon for lunch while the two men were still there. He and Mrs. Williams waited a while, and then they had dinner. He was sitting at the table, where he could see Williams, but not the other two men. "They were talking to him about signing some papers. I heard him tell them two or three times 'No'; that he wouldn't do it; that he was not in good shape to sign papers; that he was too sick," was Jordan's testimony as to what he heard.

When Jordan left, about forty minutes after he had arrived, Williams had not given his consent to signing the papers (Tr., p. 117).

On cross-examination Jordan testified:

> "Two or three times I heard something about signing papers, or Mr. Williams saying he didn't want to sign some papers. He was sitting at the table when

I heard that. Mrs. Williams was at the table, too. I suppose that she could have heard anything I heard then" (Tr., p. 119).

So it appears that while Mrs. Williams and Jordan were both at the same table, the only thing [illegible] the whole conversation Jordan heard was about the signing of papers, and Mrs. Williams didn't hear anything about the signing of the papers, though Jordan said that she, being there at the same table with him, could have heard what he heard.

Neither Mrs. Williams nor Jeff Jordan testified that P. H. Williams was out of his mind or conversed irrationally at any time on that same day, to wit, September 18, 1931, or on any other day. Neither testified that he was flighty, or under the influence of a drug, or that he failed to recognize anyone. In fact, neither witness testified that there was anything the matter with Williams' mind either before, during or after the conversation of September 18, 1931.

We glean from other portions of Mrs. Williams' testimony that she and P. H. Williams had been married for about thirty years; that he was working in the oil fields as a day laborer when she married him, and that he was connected with the oil business most of their married life; that, commencing in 1918, he bought machinery and drilled wells either for other people or for himself; that later he drilled for himself a well at Big Lake and made quite a bit of money; that when he sold his lease there he bought the ranch on which they later lived; that he had about 1,000 acres, one half of which was in cultivation and one-half in pasture, on which he had some live stock (Tr., pp. 103, 104).

Mrs. Williams related that her husband had been a sick

mon since the spring of 1931; that he was much worse from the middle of August, when he was kicked in the abdomen and other portions of his body by a bull yearling; that he was bothered with hiccups from then on until he died. She testified that after the injury in the middle of August he was not able actively to pursue his business of farming and ranching (Tr., p. 103). But from other witnesses of the plaintiff we shall see that he continued to give directions to the ranch hands.

Between September 10th and September 16th Williams went through Dr. Nibling's clinic, where X ray pictures were made of him, and where his sputum and urine were examined. His urine showed some sugar. As a result of the X rays and the history given, Dr. Nibling's diagnosis was that Williams had trouble with his liver and gall bladder, either malignant or serious, and that it could have been cirrhosis of the liver or cancer of the liver. Dr. Nibling was also of opinion that Williams was absorbing pus as the result of infection around his gums and teeth, and he advised that the teeth be pulled (Tr., pp. 109 111). Accordingly, Dr. Chase pulled, on the morning of September 17, 1931, fourteen teeth, all of the teeth that Williams had. Dr. Chase found that some of the teeth were abscessed and that there was considerable bone destruction. He administered "anaesthesin" before extracting the teeth, and he observed that Williams had a nervous condition and that his physical condition was not good. He did not testify that he observed that anything was the matter with Williams' mind (Tr., p. 109).

After the teeth were pulled Williams returned to his hotel in San Angelo, but being nervous and restless, he, with his wife, drove back to their farm after sundown (Tr., p. 105).

Mrs. Williams testified that Williams had practically no rest or sleep the night of the 17th; that he was bothered with hiccups all night, and that his teeth bled "terribly" all through the night; that he wouldn't eat that night or the next morning, and that the next morning he had fever between 101 and 102 (Tr., p. 105). She testified that on discovering, after the conversation with George Lee and Humlong, that her husband had fever around 102 or 103, she had her son come for them, and they took Williams back that afternoon to San Angelo, to the hotel. They were unable to get Dr. Nibling, but about 11 o'clock that night (Tr., p. 121) a Dr. McAnulty gave Williams a hypodermic because of the hiccuping. According to Mrs. Williams, his teeth had bled "almost in a stream" the whole time, from the time they had been pulled out. After the hypodermic Williams evidently went to sleep, because he waked up about 3 o'clock on the morning of the 19th with the hiccups and with his teeth bleeding "almost in a stream," and a nurse in the hotel, upon instructions from Dr. Nibling, packed his gums (Tr., p. 107).

Dr. Nibling testified also that on the 20th and 21st of September he saw Williams, and that Williams was nervous and more or less unstrung; that Williams was spitting blood and sitting on the edge of the bed, and had a bucket by the bed where he could expectorate; that Williams wouldn't lie down, and that he only tried to make Williams comfortable with respect to his pain by giving him a hypodermic. Dr. Nibling testified that the condition of Williams' teeth and their extraction was calculated to cause a general upset of Williams' whole mechanism, and a more rapid absorption of pus for the time being. He added that a poisonous condition upsets the mental equilibrium (Tr., pp. 111, 112).

Dr. Nibling was cross examined as to what he found concerning Williams' mental condition on the occasions of his various physical examinations and consultations, and, though he was a witness for the plaintiff, his testimony on cross examination was so frank and important that we now quote it:

"Q. Did you observe anything abnormal about his mind at that time (September 16th)?

A. Not in particular.

Q. Did you observe anything abnormal about his mind the day before that, or the day before that?

A. No, sir. Nothing abnormal that you could put your finger on. **He talked sensibly.**

Q. Do you remember any topic of conversation carried on between the two of you?

A. No, sir; I don't know, other than his ailments his condition.

Q. As far as you knew; he was mentally sound at the time you examined him?

A. At that time; yes, sir.

Q. And at all other times that you examined him?

A. Yes, sir; that is right.

Q. Was he mentally sound on the 20th and 21st of September?

A. He was a sick man, but **he appeared to be in his right mind.**

Q. He was suffering pain, but **you noticed nothing the matter with his mind** on any of those days?

A. **No, sir; I did not**" (Tr., pp. 112, 113).

Williams changed doctors about October 1st and thereafter had Dr. Marberry (Tr., p. 108). Dr. Marberry had no X-rays made, but diagnosed the case as cirrhosis of the liver and abdominal dropsy. He testified that when there is a good deal of infection, and the blood vessels become distended, and the patient has to be tapped in order that

the poison may be drawn off, there is a reaction that enfeebles the whole system, both body and mind. He had to tap Mr. Williams two or three times to draw off the fluid. He testified that his treatment was only a palliative measure, because Williams was in a manner dead during the time he treated him, and Williams died two weeks after the doctor first saw him (not when Williams first went to see the doctor; he walked to the doctor's office (Tr., p. 135)). On cross examination the witness admitted that before the disease reaches such an acute stage that the patient has to be tapped, the patient's condition varies, and that he will have his "ups and downs." Dr. Marberry did not attempt to testify as to what P. H. Williams' mental or physical condition might have been on or about September 18, 1931, and, of course, he did not see him till September 30, or October 1, 1931 (Tr., pp. 113-116).

At his death Williams was only 55 years of age, having been born December 10, 1875 (Tr., p. 162).

The witness Jordan testified to noticing a change in Williams after the bull injury; that Williams didn't seem like himself; that he would be sitting around and studying "a right smart"; that he might take several minutes before answering something said to him by Jordan; that he would tell Jordan to do a piece of work, and later, forgetting the instruction, would want to know why Jordan was doing it; that he would jump on Jordan for not being able to accomplish work that Jordan didn't consider any man could do in the time allotted by Williams. Once Williams and Jordan were counting cattle, and, according to Jordan, Williams forgot to count and took Jordan's count. After the injury Williams didn't do any physical work, though he did help count the cattle, and he con-

tinued to give the men working for him directions now and then, as the previous testimony shows (Tr., pp. 116-118).

H. G. Whittaker, engaged in the employment and feed business at San Angelo, noticed a physical change in Williams "a good while" before the latter's death. He placed the time of change as being eight to ten months before giving his testimony, which was some two to four months after Williams' death (Tr., p. 119).

Mrs. J. P. Webb, who operated the hotel where Mr. and Mrs. Williams stayed, corroborated some of the details of Williams' sickness, particularly on the night of the 18th of September. She said, moreover, that while Williams was sick there at her hotel she once tried to give him some medicine and he refused to take it and spit the medicine right in her face, and that about eight or ten days before his death he grabbed her by the arm and clinched it and stuck his nails into her flesh (Tr., pp. 120-122).

Jim Mabry, another hired hand on the ranch, narrated the details of the injury from the bull and his observation of a change in Williams' condition during the spring and summer of 1931. In counting the stock he noticed that Williams would invariably find some brute missing that actually was not missing—that he always made a mistake in the count; that he would give orders that he deemed impossible of performance; that he would have the middle of an irrigation ditch cleaned, leaving both ends dirty, and then try to force water down through the ditch; that he would come out to the field in his car, and, instead of getting out, as he usually did, he would lean on the steering wheel and apparently go to sleep, or be in a dazed condition, for from ten minutes to half an hour.

After the injury from the bull Williams would walk around where Mabry was working, but he walked with a slight stoop, holding his hands on his stomach. He did not do physical work after the injury, but he continued to give Mabry orders up until the time Mabry left on September 3rd. It had not been Williams' practice to be a regular hand even prior to the injury; he just helped out on special occasions (Tr., pp. 122-124).

George J. Bailey, in the garage business in San Angelo, testified that he noticed a change in Williams in the spring or summer of 1931. He didn't see as much of Williams as he used to. Williams was indebted to him, and one day, some four or six weeks before Williams died, Williams intimated to him that he was contemplating ending it all and letting his insurance pay his bills (Tr., pp. 124, 125).

A. E. Henderson, an oil well driller, testified that he drilled for Williams a well near Barnhart, Texas, to a depth of 8,900 feet; that it was a dry hole, and that it must have cost Williams about $150,000. Several days before the well was abandoned Williams realized it was condemned, and said he believed he would get his gun out and let the insurance company pay his debts. Williams, however, didn't do this. He had the dry hole plugged in September, 1930, and in the fall and winter had Henderson drill two more wells that were dry holes, each at a cost of about $20,000. Henderson noticed a change in Williams' condition after the completion of the deep hole in September, 1930. He noticed that Williams aged fast, was not as patient as formerly, and was more given to finding fault about little things. While the last test he ever put down was being drilled, the countershaft and the engine were out of line. Henderson thought that the

countershaft ought to be moved, but Williams insisted that the engine be moved. Henderson ignored instructions and moved the countershaft and didn't move the engine. A few days later Williams came back, noticed the engine had not been moved, and demanded that it be moved, but finally gave up and drove away. Later he came back, started to move the engine, but finally left it where it was. At the end of February the witness and Williams had an altercation, during which Williams struck the witness in the face. At the time Williams was sitting in his car and the witness thought that Williams either made a motion to get a gun or else to unlatch the car door. In the summer and fall of 1931 the witness saw Williams frequently in San Angelo, and Williams appeared to be much broken in spirit and health; to go bent over and absorbed in himself, without noticing other people much. Williams continued to refuse to speak to the witness. Once, in July or August, the witness saw Williams park his car by a bank downtown and then remain in the car for about forty five minutes, slumped over the wheel, with his arm on it (Tr., pp. 126-129).

Grover C. Parrish testified that he was an oil well driller, and that he noticed a change in Williams after Williams finished the deep well and lost his money; that after that Williams seemed to age and to be "down and out," and not have much to say to anybody (Tr., p. 129).

Joe Stocks, engaged in the sheep business on a nearby ranch, remembered noticing a change in Williams in the summer of 1931. He noticed that Williams was bothered and worried about business, and was irritable. He recalled that Williams had a difficulty with a boy on his place and that the boy struck Williams over the head with an automobile crank. On one occasion, about June

1, 1931, the witness agreed to pasture some cattle for Williams, and then Williams forgot about it until the witness reminded Williams of the agreement thirty or forty days later. Then Williams wanted to exchange some grain for the grass in the pasture, and they agreed on a price and he let the witness have 400 bushels. Later, when they went to settle, Williams had charged the witness for only 200 bushels (Tr., p. 130).

There was no other evidence by anyone who had ever seen Williams bearing on Williams' physical or mental condition at the time he executed the order transferring the dividends to Lee & Lee.

Dr. F. S. White, an alienist who had had several years experience with some state institutions for the insane in Texas, and who had operated a private sanitarium for nervous and mental diseases during a portion of the time, was called to the stand by the plaintiff. He was asked a long hypothetical question, containing a statement of some of the facts heretofore narrated, and set out on pages 132-136 of the transcript. The witness was asked to state whether, in his opinion, P. H. Williams, on September 18, 1931, had "the mental power and capacity to weigh and understand and consider the nature and effect of a business transaction," and the witness was asked to base his answer upon the assumed state of facts.

Over the objections of the defendant the witness answered:

> "I will answer that question assuming all of these statements are true, and, assuming that, my opinion would be that he was not in a condition to know the nature and effect of the signing of the paper" (Tr., pp. 136-139).

The facts stated in the hypothetical question included none of the conversation that took place between Williams and George Lee and Humlong as narrated by the latter two, or as narrated by Mrs. Williams or Jeff Jordan. In fact, there was no testimony in the record from either Lee or Humlong at the time that the alienist was on the witness stand. The hypothetical statement contained no mention of the fact that on the morning of the conversation Williams was fully dressed and responded to the knock at the door, or that, at the close of the conversation, he voluntarily walked out to the front gate where Lee and Humlong's car was parked and engaged in pleasantries about cattle and other topics before returning to the house. It included a reference to the testimony of Williams' physician, brought out on cross-examination, to the effect that he did not observe unsoundness of mind at some period not stated, but contained nothing to show that such physician, just two days before and just two days after the act of signing, found nothing the matter with Williams' mind when he examined Williams, and that Williams talked sensibly when he was in the physician's presence.

On cross-examination Dr. White, in recounting the facts that he assumed and relied on, recalled testimony to the effect that, during the conversation with Lee and Humlong, Williams said he was a sick man and not in a condition to attend to business, and the alienist said that such testimony showed that Williams "realized his condition." The witness also added that an important factor upon which he based his answer that, in his judgment, Williams was not in a condition to know the nature and effect of the signing of the instrument, was the fact that Williams had been bleeding "for two or three days—something like that—and rather extensively." There was

no statement in the hypothetical question, or in the evidence, that warranted the doctor's assumption of extensive bleeding for two or three days prior to Williams' act of signing the instrument (Tr., pp. 111-113). Williams' teeth were extracted only twenty-four hours before the act of signing, and at no time prior to the act of signing, and not until about eleven or fifteen hours after such signing, did Williams' bleeding gums require or receive medical treatment. He was taken to San Angelo on the afternoon of the 18th, because Mrs. Williams got scared on account of the rise of his temperature to 100 and a fraction. Even then they did not start for San Angelo until it got cooler, and after they arrived they did not immediately summon a physician, but about 11 o'clock that night a physician was called to give Williams a hypodermic, according to Mrs. Williams, not because he was bleeding, but because "Mr. Williams was breathing so terribly" (Tr., p. 107).

Argument

There being a presumption of mental capacity, the burden was on the plaintiff to establish the lack of requisite mental capacity by showing that P. H. Williams, at the time of the execution of the assignment, did not understand the nature and effect of such act.

> Wigmore on Contracts, Vol. 1, Sec. 236, p. 500;
> Parker v. Marco, 76 Fed. 310;
> Richardson v. Travelers Ins. Co., Me., 89 At. 1009;
> Shardlow v. Miller (N. J. Ch. Ct.), 63 Atl. 472;
> Aldrich v. Bailey (N. Y. Ct. App.), 30 N. E. 264.

Though petitioner and respondent seem to be agreed upon the legal standard of requisite mental capacity with

reference to contractual relations, such standard may be restated in the language of Professor Williston:

> "The question, therefore, should depend, and, according to the great weight of modern authority, does depend, upon whether the alleged lunatic had **sufficient reason to enable him to understand the nature and effect of the act in dispute.** It is not necessary, however, that a person should have average mental capacity in order to make a valid bargain. **Mere weakness of mind or a condition approaching imbecility is not sufficient** to constitute what the law regards as insanity."

The rule by which the action of a trial court should be guided in determining whether there was sufficient evidence to go to the jury on an issue, as promulgated by the Supreme Court of the United States, is as follows:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule, 'that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.'" (Guiterry v. Cooley, 281 U. S. 90, 94).

The burden cannot be sustained merely by arousing a suspicion as to the issue and by leaving the whole question "in the realm of conjecture, possibility or surmise." (Wallace v. Standard Accident Insurance Co. [C. C. A., 6th Cir.], 63 Fed. [2d] 211).

The evidence in this case fairly shows that Williams had been undergoing a change in his physical and mental

condition prior to the date on which he signed the instrument in question. That he was a sick man suffering from a physical malady, which a month later resulted in his death, cannot be denied. As a result of financial reverses and sickness he was despondent. On two occasions he had contemplated suicide, but reason seems to have prevailed with him each time, as he continued to live, and died a natural death. He showed some evidence of absent mindedness and forgetfulness also in matters such as the counting of numbers and orders given to hired hands. He kept more to himself than formerly, had less to say to acquaintances and exhibited less interest in them. He had become irritable and cross on occasions.

Certainly the foregoing does not constitute any evidence that Williams did not understand the nature and effect of the signing of the instrument whereby he transferred the dividends due him to Lee & Lee. They are merely circumstances that may be taken into consideration in weighing evidence of a more cogent and direct nature as to a lack of requisite mental capacity at the time of execution.

The fact that Williams had about three degrees of fever on the morning of the 18th of September, and that his gums undoubtedly did bleed some during the twenty four hours following the extraction of the teeth, and preceding the conversation with George Lee and Humlong and the act of signing, shows beyond peradventure that the deceased was in a weakened condition. But such evidence does not show that he was flighty, mentally exhausted, stupefied, unconscious or otherwise incapable of reasoning on the morning of the 18th. Mahatma Gandhi, as pointed out by the trial judge in his charge, is a striking illustration of a man intensely weak physically and yet intensely strong intellectually. Even when Gandhi fasted in jail for days, he had complete command of his mental powers.

The affirmative facts as to what was said and done on the morning of the 18th belie the fanciful claim that Williams was so weakened physically that he did not have command of his mental faculties. To whatever extent he had bled, it was not sufficient to require before late that night or the early morning of the next day the summoning of medical aid. As already pointed out, he had medical treatment on the night of the 18th, possibly eleven or twelve hours after the execution of the instrument, but, according to Mrs. Williams, such treatment was a hypodermic administered for the purpose of relieving his pain from hiccuping. The uncontradicted testimony of disinterested witnesses shows that he was not weakened to such an extent that he had to stay in bed on the morning of the 18th. He was up, dressed, and he answered the knock at the door. He was not in bed during the conversation which Mrs. Williams would have us believe lasted for two hours. During such time he was in the living room in a chair, and was moving around to some extent. He voluntarily walked to the front gate to bid goodbye to his visitors whom he came to treat as guests. He was capable, therefore, of reasonable physical exertion during the morning, and at and after the time he signed the instrument. He was also capable of reasoning, as is shown by the details of the conversation he carried on. According to Mrs. Williams and Jeff Jordan, Williams said that he was sick and wanted to put off the business conversation, telling his visitors that he would be in San Angelo within a few days and would then attend to the matter. This, in itself, shows the exercise of mental power. He had been approached on a subject that he might be loath to talk about, even if well. His statement shows his engagement in rational, intelligent and connected conversation. The testimony of Hamlong and

George Lee brings out that Williams talked to them of his herd of cattle, mentioning where he had gotten them and how proud he was of them. He also talked to them about the oats in his bins, and added that he was holding them for a better price. The carrying on of such conversation by Williams showed that he had power to reason about business matters, and that he used judgment. Williams had first told George Lee that he was peeved at the insurance company, that he did not want to transfer the dividends to Lee & Lee, that he wanted to keep the dividends himself. This showed not only that he was mentally alert and capable of coherent thought, but that he had understanding of the transaction actually involved. In these respects George Lee and Humlong were wholly uncontradicted.

The fact that Mrs. Williams knew that the two strangers called to discuss business with her husband; that her husband was discussing business with them; that she did not enter the room to inform the strangers that her husband was mentally incompetent and unable to discuss business with them; that she did not enter the room to interfere with her husband or to dissuade him from transacting business with the strangers; that she did not enter the room to lend him any assistance in the transaction of business with the strangers, and that she did not testify that at any time she observed anything unusual in the mental conduct of her husband, is proof positive of the fanciful nature of the claim placed before Court and jury in this case.

The testimony of Dr. Nibling, the plaintiff's own witness and Williams' own physician, shows what Williams' physical and mental conditions were two days before and two days after the act of signing. From the 10th to the 16th Dr. Nibling had given Williams a thorough examination, and on the 16th he made a diagnosis. On all of

those days Williams "talked sensibly" in the presence of the doctor. The first medical treatment for bleeding of the gums came quite a few hours after the act of signing, either late on the night of the 18th, or about 3 o'clock in the morning of the 19th. There is further evidence that Williams was troubled with bleeding and pain on the 19th, 20th and 21st, and that Dr. Nibling went to see him on the 20th and 21st, and that Williams was still "spitting blood and sitting on the edge of the bed, and had a bucket by the side of the bed where he could expectorate." He found Williams "nervous and more or less unstrung" and "holding ice in his mouth, trying to stop the hemorrhage." Even at the end of forty-eight hours and seventy-two hours after the signing of the instrument, Williams was not so exhausted from the continued bleeding and the ravages of pain and disease in the interval but that he had retained his mental faculties. According to his own physician, Williams still appeared on the 20th and 21st "to be in his right mind," and such witness for the plaintiff noticed on such dates "nothing the matter with his mind."

It is uncontradicted, then, that Williams was in the possession of his mental powers both two days before and also even two days after the signing of the instrument.

There is no testimony from any one of the plaintiff's witnesses that knew Williams—not even Mrs. Williams or Jeff Jordan, the hired hand—to the effect or even indicating that on the 18th, or for that matter on any other day, that Williams was unconscious from physical exhaustion, in a stupor, out of his head or flighty. There was no testimony from any of such witnesses that on the 18th Williams failed to recognize anyone, or that he could not or did not engage in rational, connected conversation.

The evidence of the witnesses who had known Williams,

on the other hand, showed affirmatively that on the morning of the 18th, when the instrument was signed, Williams was up, dressed, walking around, capable of reasonable physical exertion, and that he was clear-headed, recognized those with whom he came in contact and was able to and did reason and carry on a coherent, intelligent conversation about business and other matters.

Certainly, from so much of the evidence, it could not be reasonably inferred that Williams was incapable of understanding the nature and effect of the simple transaction of transferring the dividends earned on his policies to Lee & Lee to pay a debt that he admittedly owed them. Not even a suspicion of legal mental incompetency at the time is raised.

In re Little's Estate (Dist. Ct. of App., Cal.), 189 Pac. 818;
In re Campbell's Estate (Dist. Ct. of App., Cal.), 189 Pac. 812;
In re Shields' Estate (Sup. Ct. of Iowa), 200 N. W. 219;
In re Richardson's Will (Sup. Ct. of Iowa), 202 N. W. 114;
Richardson v. Travelers Ins. Co. (Me.), 82 Atl. 1005;
Sayre v. Trustees of Princeton University (Sup. Ct. of Mo.), 90 S. W. 787;
In re Laflin's Estate (Sup. Ct. of Neb.), 187 N. W. 885;
Johnson v. Talbot (Mass.), 150 N. E. 900;
Taylor v. Creeley (Mass.), 152 N. E. 3.

In the case of In re Little's Estate the evidence submitted by the contestant may be summed up as follows: The testator, a man of some education, at one time cashier in a bank and later a farmer, succeeded well enough to accumulate a comfortable fortune, but he suddenly met

with a series and variety of reverses, which so shocked his nervous organization as to have worked changes in his physical and mental characteristics. Death claimed his wife after they had only been married a little over a year. Shortly thereafter the stable located on his farm was destroyed by fire. This misfortune was soon followed by the theft of an automobile owned by him. Following these troubles he appeared to grow discouraged and disappointed, and applied himself more liberally to the consumption of intoxicating liquors than he had ever before been accustomed to indulge in theto. He lost flesh and displayed mental peculiarities not theretofore noticed by anyone. According to some of the witnesses he acted irrationally at times. On one occasion, when dwelling on his misfortunes, he wrung his hands and talked to himself, and on another occasion, while under a great nervous strain, he exclaimed that all his misfortunes would drive him crazy. On another occasion he complained that an engine used on the farm was out of order and would not perform, but a machinist found it intact in all respects. Some witnesses for the proponents testified that while the testator on occasions acted very peculiarly and like one laboring under a severe nervous and mental strain, he did not appear to be irrational. There was no positive testimony that the testator was under the influence of intoxicating liquor at the time he wrote his will in longhand. The testator committed suicide about a month after he wrote the will. The trial court took the case from the jury and entered an order admitting the will to probate. On appeal such action was upheld on the ground that the contestants' evidence was not sufficient to make out a case to go to the jury on the issue of lack of testamentary capacity.

In the case of In re Campbell's Estate the evidence, as

characterized by the Court, showed "that the deceased had been for many years a heavy drinker of intoxicating liquors, and during the latter years of his life drank liquors to excess; that he was a very old man when he made his will, and that he was feeble physically; that on occasions he was so ill as to be compelled to take to his bed, the cause of such illness, it is to be inferred from the evidence, being the excessive use of alcoholic liquors; that he could not readily remember old acquaintances when their names were mentioned to him or when they met and greeted him * * *; that he often spoke of the Bible and would ask his friends if they thought he was saved, and would cry very often." The action of the trial court in taking the case from the jury and in awarding judgment against the contestants of the will was upheld on the ground that the evidence was insufficient to require the submission to the jury of the issue of testamentary capacity.

In the case of In re Shields' Estate the testator was a farmer, dying at the age of 71 and leaving surviving him a daughter and a son. The will was executed about two and one-half months prior to his death. There was evidence that the testator had had a spell of sickness and had been confined in a hospital, and that he had arteriosclerosis. Other evidence was to the effect that the testator was at times irritable, childish in some ways and forgetful. A physician called by the contestant testified that the testator talked rationally and sensibly, and that he did not notice anything out of the normal in his mental state when he examined him some time between the execution of the will and the testator's death, three months later. The trial court directed a verdict for the proponents of the will and the contestants appealed, but the judgment in favor of the proponents was upheld, the Court saying:

"Time and again this Court has declared that mere old age or some deterioration in physical or mental powers, or peevishness, childishness and eccentricities are not alone sufficient to carry to the jury the question of mental unsoundness on the part of a testator."

In the case of In re Richardson's Will the testatrix, at the age of 78, executed a will while she was in bed sick with pneumonia, of which she died four days later. The will was executed at about 7 o'clock at night, and on the morning of the same day a physician was called and found her suffering a great deal with pain in her chest, labored respiration and some temperature. He saw her again in the afternoon, found the trouble localized in the right side of the chest and diagnosed it as pneumonia. He found an irregular heart action, which he designated as a partial heart block. He testified that pneumonia caused poisons in the system until they affected mentality, and that heart block impairs the circulation through the brain and the entire system and could affect the mentality to a certain degree. Within a few minutes after the will was executed the same physician saw the testatrix again. He testified that the testatrix would have to be asked a question two or three times; that he did not know whether she was in a state of losing her reason entirely. He added: "I would say, under those circumstances, she was of unsound mind. She was in a certain stupor or mental apathy." Two daughters who saw the testatrix the next morning said that their mother's eyes were glassy; that she was weak and pale and she breathed hard, and that she acted as though she were really too sick to know who they were, or what was going on in the room. The trial court submitted the case to the jury, and the jury returned a verdict for the contestant and found that the testatrix did not possess tes-

tamentary capacity. But, on appeal, it was held that the evidence was insufficient to sustain the finding that the testatrix was of unsound mind at the time the will was executed. The Court said:

> "She was physically, not mentally, ill. Any mental disturbance or impairment from which she suffered was the result of her physical condition. It is not doubted that, as a result of physical ailments, a person may, in the progress of the disease or by reason of weakness, become mentally incompetent, or that this may occur in the case of one suffering from the ills that afflicted the testatrix. **But the evidence wholly fails to show that such a stage had been reached in the course of her illness at the time the will was executed.** She was suffering and was weak; but the only indication of mental disturbance noticed by Dr. Hoefer was that it was necessary at times to repeat questions to her. His statement that she was in a sense of unsound mind clearly had reference to that situation as being a departure from the normal."

The other cases cited are of similar import.

If it be true then that the evidence adduced, exclusive of the testimony of the alienist, Dr. White, was insufficient to carry the case to the jury on any charge as to the issue of lack of mental competency, did the expert opinion of the alienist, who, without ever having seen Williams, gave an answer to a hypothetical question based upon a part of such evidence, and omitting much undisputed material evidence of an adverse nature, require that the case go to the jury on a charge with reference to such issue? The solution of the question depends in part upon the nature of such testimony, which is analyzed by Thayer in the following language:

"They 'judge' the phenomena, the appearances or facts which are presented to them, and testify to that which in truth these signify or really are; they estimate qualities and values. We say that they testify to opinion. In truth, they are **'judging'** something and testify to their conclusion upon a matter of fact * * *; they are simply to aid the final judges of fact, and not to bind them" (Thayer, "A Preliminary Treatise on Evidence at the Common Law," p. 196).

Time and again, where the alienist has not seen the person whose mental capacity is in issue, and where he answers only a hypothetical question which a court has felt did not, as a matter of law, contain any reasonable basis for the expression of an opinion against mental competency, or which did not contain substantially all of the essential facts proven at the trial by the undisputed evidence, the Court has not hesitated to take the case from the jury notwithstanding such expert opinion.

In re Little's Estate (Dt. Ct. App., Cal.), 189 Pac. 818;
In re Richardson's Will (Iowa), 202 N. W. 114;
Sayre v. Trustees of Princeton University (Mo.), 90 S. W. 787;
Taylor v. Creeley (Mass.), 152 N. E. 3.

With reference to the case of In re Little's Estate, we have already shown the essential facts testified to by witnesses who had known and observed the testator. They bear in many respects a striking similarity to the facts relied upon by the plaintiff in this case. In addition, the contestant produced an alienist who was asked a hypothetical question embodying the facts that we have detailed, and he said that in his opinion, at the time the will was written, the testator was insane. Notwithstand-

ing such opinion the Court refused to let the case go to the jury on the issue of mental competency, and such action was upheld on appeal. With reference to the expert testimony the Court said:

> "* * * but as to this character of testimony the Supreme Court, in Estate of Dolbeer, 149 Cal. 227, 243, 86 Pac. 695, 702 (9 Ann. Cas. 795), has justly declared: 'The witnesses were skilled alienists, it may be conceded, but the evidence thus adduced of one who has never seen the person or who bases his opinion upon the facts given in a hypothetical question is evidence the weakest and most unsatisfactory.'"

In the case of In Re Richardson's Will, likewise a case where the appellate court considered that the evidence was insufficient to go to the jury, notwithstanding the opinions of expert witnesses given in answer to a hypothetical question, the Court characterized the testimony of expert witnesses so given as "a class of testimony generally recognized as weak" and "in this case of little or no value in determining the mental condition of the testatrix at the time the will was executed."

In the case of Sayre v. Trustees of Princeton University, wherein the trial court let the case go to the jury and the jury returned a verdict that the paper writing propounded was not the last will and testament of the testator because of lack of testamentary capacity, and wherein the Appellate Court reversed the case with directions to enter a judgment admitting the will to probate and holding that the evidence was wholly insufficient to go to the jury on any question of mental incompetency, the Court said, with reference to the testimony of several alienists given in answer to a long hypothetical question:

"We are not bound to accept an opinion based upon facts which the law will not, and does not, recognize as showing a want of capacity to make a will."

In Taylor v. Creeley, the Appellate Court was of the opinion that all of the evidence, notwithstanding the adverse testimony of experts, was insufficient to go to the jury on any issue of mental incompetency.

We have already shown that in our case the cross-examination brought out that the alienist, in giving his answer to the long hypothetical question propounded to him, went outside the facts stated to him, and from his own imperfect memory of what he had heard in the court room from witnesses, assumed as the principal fact upon which his opinion was based that Williams, prior to the act of signing, had been bleeding "for **two** or **three** days, something like that, and rather extensively." His assumption was unfounded, because of the uncontradicted evidence that, prior to the act of signing, Williams' gums had been bleeding approximately twenty-four hours. It is implied that the alienist's opinion was based upon assumption of such complete physical exhaustion as to make reasonable an inference of mental collapse. Such assumption and such inference are both refuted by facts not put to the witness in the question propounded—facts that at, and for at least an hour or so prior to the act of signing, Williams was up, dressed and responded to the knock at the door when George Lee and Humleng arrived, and that while they were there he engaged in intelligent, coherent conversation about business and other matters, and that when Lee and Humlong left he voluntarily walked with them to the front gate and engaged in more rational conversation—facts which show conclusively that at the time of signing Williams was not only capable of reasonable

physical exertion, but also in possession of his mental faculties and power of reasoning.

We submit that there was no evidence from which it may be reasonably inferred that Williams appeared to be mentally ill on the morning of September the 18th, much less that he was so mentally ill on such morning that he could not have understood the transaction of assigning the dividends to Lee & Lee.

We submit, therefore, that none of the evidence was sufficient to take the case to the jury on the issue of lack of mental competency. This being so, it follows that the assignment of the dividend declared on the policy that lapsed was valid, that pursuant to such assignment the dividend was paid to the insured (or his order) in cash, which was one of the options afforded by the policy, and that the dividend was thus validly applied, and cannot be used again for any other purpose. It follows, for such reason alone, if for no other, the trial court erred in not instructing the jury, in accordance with the defendant's request, to return a verdict for the defendant.

POINT 2.

The so-called fraud in the procurement of the dividend order, now claimed by the petitioner, was not pleaded, and the pretended claim of fraud, as pleaded, or as now claimed, was not substantiated by evidence sufficient to raise any issue of fraud for submission to the jury; the Court's charge ignored any issue of fraud, and the petitioner made no objection to such charge, and requested no charge on any issue of fraud, but abandoned in the trial court all claim of fraud.

The pretense of fraud, made in the petitioner's supplemental brief under point 2, and of mistake under point 3,

was not passed upon by the Circuit Court of Appeals (nor were such questions raised in the petition for writ of certiorari). Though we do not anticipate that the Court will consider the questions now, we shall reply to the petitioner's contentions set forth in her supplemental brief.

On page 5 of the brief the petitioner erroneously referred to the "respondent's assignments challenging the sufficiency of the evidence to show mental incapacity, **fraud or mistake.**" On page 10 of the petition for writ of certiorari the petitioner again erroneously referred to the respondent's assignments of error challenging the sufficiency of the evidence to show fraud or mistake. The assignments of error are set out in the record on pages 195-212 of the brief. None of them relates to fraud or mistake, or raises any issue with reference to either.

The burden of petitioner's point 2 is that George T. Lee, attorney for Lee & Lee, in an effort to collect for Lee & Lee a debt due personally from Williams to Lee & Lee, told Williams, in effect, that the insurance was at an end, and he wanted Williams to use the dividends to pay an honest debt to Lee & Lee, that Williams believed and relied on such opinion, and that the insurance company realized, or should have realized, that such expression was made and resulted in Williams' execution of the dividend order. No misrepresentation of a fact is charged.

Nowhere in the pleadings, however, is there any claim that George Lee made any verbal misrepresentation of any character to Williams, or even passed on to him an erroneous opinion or belief, as to Williams' rights under the policy. The only claims of fraud set forth in the petitioner's pleading are contained in paragraphs IV and V of the petitioner's first supplemental petition (Tr., pp. 57-

59). In paragraph IV it is alleged that the dividend order signed by Williams, and addressed to the insurance company, contained the recital that the policy in suit had lapsed along with other policies carried by Williams, and that thereby Williams was led to believe that he no longer had any insurance. In paragraph V it was claimed that one Charles A. Poteet, the company's agent at San Angelo, had made a misrepresentation to Williams as to his rights under the policy. No other claims of fraud in the procurement of the dividend order were alleged, and there is nothing in evidence whatsoever concerning the allegations in paragraph V. Likewise, there is nothing in the evidence as to what Williams believed and relied upon.

Because all pretended evidence of fraud was without probative force, the trial court submitted to the jury in its charge nothing whatsoever concerning any issue of fraud. Because this was true, the petitioner did not make any objection to the Court's charge as made, or to the Court's failure to charge as to such issue, and requested no charge on such issue. At the trial, the petitioner abandoned all claim of fraud.

The basis of the so called fraud, claimed on appeal for the first time, is that George T. Lee, in endeavoring to get Williams to pay a personal debt to Lee & Lee by assigning a written order on the insurance company directing it to pay the dividend on this and other policies to Lee & Lee, told Williams that his policies had "lapsed," and that "the default in the payment of the note to Lee & Lee constituted a cause 'of the lapsed policies'." That George Lee was correct in saying that the policies had lapsed, no one can truthfully deny. The testimony quoted from the record does not show that George Lee represented the default in the payment of the note as the real cause of the lapse,

but indicates, rather, his point of view was that the policies would have lapsed in 1930 if Lee & Lee had not come to Williams' rescue and personally advanced to Williams the funds needed to pay the 1931 premiums to the insurance company. George Lee at least made it plain to Williams that the real cause of lapse was Williams' failure to pay the premiums of June 10, 1931 (Tr., p. 153). If the policies lapsed, as indisputably they did, the reason assigned for the lapse seems to be legally immaterial.

George Lee informed Williams, at the time of the transaction complained of, that he did not represent the insurance company, could not bind the insurance company, and was there solely on the private and personal business of Lee & Lee (Tr., pp. 150, 157).

Under such circumstances the insurance company cannot be held to have participated in, or to be responsible for, anything that George Lee told Williams. As George Lee was not acting for, and did not purport to act for, the insurance company, it cannot be said to have adopted the transaction as its own. There was no occasion for adoption. The insurance company merely acted under the order received by it from Williams in paying the dividend, and had nothing to do with the procurement of the order.

The situation here is not like the situation where an agent was discharging business of his principal while furthering some secret purpose of his own, as in Gleason v. Seaboard Co., cited by petitioner, or where the agent purported to act for his principal without authority, and the principal adopted the transaction as his own, as in Henderson v. San Antonio M. G. Ry. Co., cited by the petitioner. The situation here is more nearly like that of Teagarden v. Godley Lumber Co., 105 Tex. 616, 154 S. W.

973. As, in that case, it was held that the knowledge of an agent acquired while purchasing property for himself and others cannot be imputed to his principal when the latter acquires the property in a subsequent deal, a fortiori, the knowledge of George Lee—never the agent of the insurance company—acquired in obtaining the dividend order, cannot be imputed to the insurance company when it subsequently received the dividend order and carried out the direction addressed to it by the policyholder.

In contradiction of the facts, and for the sake of argument only, let us assume that George Lee had misrepresented to the policyholder that his insurance had ceased, but, as a matter of law, it had not, and that in some way the insurance company was responsible for such expression. An honest misrepresentation by the insurance company to the policyholder of the latter's legal rights under the contract, long after the contract had been made, and when the insurance company was claiming that it was no longer insurer of the policyholder's life, would not be ground for rescinding the transaction whereby the policyholder directed payment of the dividends on his policies in cash and such payment was made (Kincaid v. New York Life Ins. Co., 5th C. C. A., 66 Fed. [2d] 268). In that case the company claimed that the quarterly premium of June, 1929, was not paid, and advised the policyholder of the lapse of his policy, and a reinstatement was put through. It subsequently developed that the company was holding dividends declared and credited to the policy in June, 1928, and 1929, more than sufficient to pay the premium, and that under the provisions of the policy the premium had in fact been so paid. In March, 1931, the company claimed that the reinstatement had been obtained by false statements, elected to rescind it, and mailed the policyholder

a check for the premiums and interest paid in making the reinstatement and since then, and stated that the policy stood lapsed as of June, 1929. In June, 1931, the policyholder cashed the check. After the death of the policyholder it was claimed in a suit against the company that the acceptance of the money in June, 1931, was induced by the company's false assertion in August, 1929, repeated in March, 1931, that the policy had lapsed and required reinstatement. As to this claim the Court held:

> "In March, 1931, whatever confidence ordinarily exists between insurer and the insured was broken. The company was then claiming a dissolution of the relationship and was dealing at arm's length with Kincaid. He labored under no legal disability or handicap. He fully understood the facts and must be held chargeable with knowledge of the provisions of the policy, and his rights under them. If he did not understand them, he ought to have gotten advice."

POINT 3.

The policyholder made no mistake as to his legal rights to the contract of insurance, but even if a mistake had been made, the insurance company would not have been responsible for such mistake, and the mistake of law would not have been a ground for setting aside the payment of the dividends in cash.

This point adds nothing to the previous point made by the petitioner, but is a part thereof.

In the first part of our brief we have stated our conception of the rights of the parties under the contract. If we are correct, no mistake was made. In our reply to the petitioner's second point, we have shown that not only was the dividend order not improperly procured, but also

that the insurance company was not responsible for anything said in procurement thereof by a stranger to the insurance company in the transaction of the personal and private business of a third person.

The case of Kincaid v. New York Life Ins. Co., cited by us under our reply to point 2, shows that Williams must be held accountable as if he knew his rights under the contract, and that if he had made a mistake as to his rights thereunder, he would have acted at his peril, and such mistake of law would have been legally immaterial.

There is no evidence in the record as to what knowledge Williams had concerning his rights under the policy. There is no evidence that he made a mistake, or that the insurance company induced any mistake. Because the pretended evidence of mistake was without probative force, the trial court submitted to the jury in its charge nothing whatsoever concerning any issue of mistake. Because this was true, the petitioner did not make any objection to the Court's charge as made, or to the Court's failure to charge as to such issue, and requested no charge on such issue. At the trial the petitioner abandoned all claim of mistake as well as of fraud.

CONCLUSION.

For the reasons hereinbefore given, the respondent, The Union Central Life Insurance Company, prays that the judgment of the Circuit Court of Appeals reversing the judgment of the trial court be affirmed.

Respectfully submitted,

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Dated November 23, 1933.

SUPREME COURT OF THE UNITED STATES.

No. 208. October Term, 1933.

Nannie May Williams, Petitioner, vs. The Union Central Life Insurance Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 15, 1934.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This action was brought by petitioner as beneficiary of a policy of insurance for $10,000 issued July 26, 1927, upon the life of her husband, who died on October 15, 1931. Application for the policy was made and the policy was delivered in the State of Texas. A level premium of $449.10 was payable annually on June 10th, and was paid to and including June 10, 1930. The premium payable on June 10, 1931, was not paid either at that time or within the thirty-one days of grace allowed by the policy. The "loan value" or "cash value" of the policy, as shown by the table which the policy set forth, was then $910. Loans against the policy, with interest, amounted to $898.88. The policy was a participating one, and a dividend of $74.80 was declared in favor of the insured on June 10, 1931. If that dividend had been applied in reduction of the amount advanced against the policy or to the purchase of extended insurance, the result would have been to extend the insurance beyond the date of the death of the insured. Petitioner contends that the dividend should have been so applied. Respondent insists that such application would have been contrary to the terms of the policy and that, on the expiration of the period of grace without payment of the premium due, the policy lapsed and the dividend was payable in cash and not otherwise.

Respondent's request for the direction of a verdict was denied and the verdict and judgment went for petitioner. The judgment

was reversed by the Circuit Court of Appeals 65 F. (2d) 240. This Court granted certiorari.

The policy gave the following options as to the disposition of dividends:

"11. Dividend Options. Dividends may be withdrawn in cash, or applied to the payment of premiums, or left to accumulate with interest at three per cent, increased from surplus interest earnings as apportioned by the Directors, until the maturity of the policy, subject to withdrawal at any time, or applied to the purchase of paid up participating additions to the policy, convertible into cash at any time for the amount of the original dividends or the reserve of the additions, if larger, but payment may be deferred by the Company ninety days from the date of application therefor."

There is no ambiguity in the terms of these options. They are clear and definite in the terminology of insurance and each is to be applied with its distinctive significance. No one of these options provides for the use of a dividend to procure extended insurance, that is, to procure an extension of the term of the insurance from the date to which premiums have been paid, without any further payment. Dividends may be withdrawn in cash or applied to the payment of premiums or left to accumulate with interest subject to withdrawal at any time. The further option to have dividends "applied to the purchase of paid up participating additions to the policy" is quite distinct from an option to procure extended insurance. A "paid up addition" to the policy, by the application of a dividend, is the amount added to the face of the policy and purchased by the use of the dividend as a single premium. For such paid up additions, there must be a legal reserve.

The insured did not exercise any one of the options given by article 11. It appears that he had several other policies issued by the same company, and in addition to the amount advanced by the company he had borrowed certain amounts from the company's agents in Dallas, Texas. These agents, on September 18, 1931, obtained an order on the company, signed by the insured, which directed payment to them of the dividend on the policy in suit together with dividends on other policies. On this order, the dividend here in question was paid to the agents. Petitioner contested the order as having been signed at a time when the insured did not have sufficient mental capacity to understand the transaction. This issue of fact was decided by the jury in favor of peti-

tioner and the Circuit Court of Appeals did not pass upon the sufficiency of the evidence in that relation. Nor do we deal with that question. The only other indication of the intention of the insured is sought to be drawn from a statement in a letter addressed to the company by its agents on September 14, 1931, referring to a conversation with the insured about September 1st. The agents said that the insured had rejected their proposal for the use of dividends on his policies in partial payment of his note held by the agents, saying that "he was going to have every nickel applied towards paying these policies as far as it would carry them". We agree with the view of the Circuit Court of Appeals that this statement was too indefinite to serve as a direction to the company to apply the dividend in question in any particular way and, unless the insurance had been extended under the provisions of the policy, it had already lapsed and could be reinstated only in accordance with the requirements of the policy, that is, upon payment of premium arrears with interest and satisfactory evidence of insurability. We are unable to find any basis for the conclusion that the insured either had, or attempted to exercise, any option to use the dividend to obtain extended insurance, and our decision must turn upon the construction of the provisions of the policy applicable to such a case.

Article 12 provides for the "automatic disposition" of dividends as follows:

"12. Automatic Disposition. On payment of the premium, or on the policy anniversary if no further premium is payable, if no other option has been elected, the dividend then due shall be applied to the purchase of paid up additions. In the event of the death of the insured during the days of grace, the current premium being unpaid, if no other option has been elected, or if the policy shall lapse, the dividend then due shall be paid in cash. At the death of the insured during the continuance of the policy, the pro rata part of the dividend for the current policy year shall be paid in cash".

The first sentence of article 12 is inapplicable as it provides for the disposition of the dividend "on payment of the premium, or on the policy anniversary if no further premium is payable, if no other option has been elected". The present case is not one where the premium was paid or where on the "policy anniversary" no further premium was payable. The first part of the second sentence is also inapplicable, as the insured did not die

during the days of grace. It is also clear that the third and last sentence does not apply. But the case does fall directly within the alternative of the second sentence, "*or if the policy shall lapse, the dividend then due shall be paid in cash*". That is precisely this case. And this provision of the policy is in plain opposition to the contention that the dividend should be applied to an extension of the insurance. The provision presupposes a dividend due and the lapse of the policy for non-payment of premium, and the dividend is then to be paid in cash.

Petitioner seeks to escape this definite stipulation by invoking the provisions of the policy as to the use of the "policy value" or "surrender value" in obtaining extended insurance. After stating that the reserve of the policy "is computed on the American Experience Table of Mortality with interest 3½%", the policy provides:

"15. Surrender Value. After two full years' premiums have been paid, the surrender value for each thousand dollars of insurance is equal to the reserve at the end of the policy year, omitting cents, except that in the second, third and fourth policy years, it is equal to the reserve at the end of the policy year, taken to the nearest dollar, less surrender charges of $21, $13 and $6 respectively.

"16. Policy Values. The surrender value may be used at the option of the owner of the policy in any one of the following ways, all of equal value, as set forth in the following tables, provided there be no indebtedness or advances on the policy. If, on failure to pay a premium, no option is exercised, such value shall be applied as provided in Option 1.

"17. Option 1. Extended Insurance. Applied to the extension of this policy as participating term insurance from the date to which premiums have been paid, without any further payment (Table 1.) The value of any paid-up additions will be used to increase the term of extension. Accumulations of dividends at interest may be applied to increase the term of extension. Dividends on extended insurance shall be paid in cash and only for completed policy years.

"22. Deduction of Indebtedness. If there be any indebtedness or advances on this policy, the cash value shall be reduced thereby; the paid-up value shall be reduced proportionately; and the extended insurance shall be for the face value of the policy less the indebtedness and advances and for such term as said reduced cash value will provide".

Petitioner argues that an earlier provision of the policy (article 8) that "after two full years' premiums have been paid, on failure to pay any subsequent premium, this policy shall lapse and its value, if any, shall be applied as set forth in article 16", conflicts with the provision of article 12 that the dividend in case of lapse shall be paid in cash. There is no conflict, however, as article 16 refers to the use of the "surrender value" as defined in article 15. Instead of there being inconsistency, article 8 expressly provides for lapse on non payment of premium, the event on which, by article 12, the dividend is to be paid in cash. The dividend is not a part of the "surrender value". That value is equal to the "reserve" at the end of the policy year, less the "surrender charges" stated. Where level premiums are paid, the amount of the annual premium is necessarily greater than the mortality cost during the early years of the insurance and less than the mortality cost in later years. With the mortality table and an assumed rate of interest on the investment of premiums received, the amount of the accumulated savings on this basis, at any date, can be mathematically computed. This amount constitutes the "reserve" against the policy or its net value. The insurer must have on hand the aggregate amount of these reserves against its outstanding policies. And in case of lapse, after a policy has been in force for a specified time, its net value or "surrender value", less surrender charges, is made available to the policyholder.

"Dividends" are in a different category. In fixing the annual level premium, there is added to the sum required on the basis of the mortality table, and assumed rate of interest, an amount to cover anticipated expenses and contingencies. If the rate of mortality exactly coincided with the expected rate, and the income, expenses and contingencies were precisely in accordance with the allowance made therefor, there would be no surplus and hence no dividends. But in the actual course of business there may be, and probably will be, gains from the fact that the mortality turns out to be less than that expected, or that the income is larger or the outlays are less than those estimated, and these gains are distributable to policyholders by means of "dividends" in accordance with the provisions of policies. The "surrender value" is calculated on the basis of the reserve and without reference to such possible dividends.

In this instance, according to the tables set forth in the policy to which article 16 refers, the surrender value at the time in question was $91 for each $1000 of insurance, and thus amounted to $910. According to article 22, this "cash value" was to be reduced by the amount advanced on the policy. It is not questioned that the amount which had been advanced, with interest, was $898.88. There was thus left, of the surrender value, the sum of $11.12 which the insured was entitled to have applied as provided in article 16. The insured, on the failure to pay the premium due, did not exercise any of the options for the use of the surrender value of the policy under article 16, and hence "such value" was to be applied "as provided in Option 1", set forth in article 17. The amount to be so applied was clearly the surrender value of $11.12, as above stated. And under "Option 1", it was this amount that was to be used to obtain "extended insurance."

Article 17 provided that this amount should be "applied to the extension of this policy as participating term insurance from the date to which premiums have been paid, without any further payment (Table D)." According to that table, the sum of $910, the total surrender value without deducting advances, would have sufficed to purchase $10,000 of participating term insurance for "four years, 330 days", that is, at between 50 and 51 cents a day. The amount remaining of the surrender value, after deducting advances, or $11.12, would thus purchase extended insurance for only twenty two days, a period inadequate to keep the policy alive until the date of the death of the insured.

The petitioner is not aided by the other provisions of Article 17. It provides that "the value of any paid up additions will be used to increase the term of extension". But there were no "paid up additions". Prior dividends had been used in reduction of the annual premiums paid. No option had been exercised for the use of the dividend in question in the purchase of a paid up addition as provided in article 11, and that dividend, on the lapse of the policy, became payable in cash by the terms of article 12. Article 17 also provided that "accumulations of dividends at interest may be applied to increase the term of extension". This provision manifestly refers to the option in article 11 that dividends may be "left to accumulate with interest at three per cent". That option had not been exercised and no dividends had been left

to accumulate. The provision has no application to a current dividend as to which no option had been exercised and which on the lapse of the policy is expressly made payable in cash. If, after the lapse and during the life of the insured, the company had attempted to apply that dividend to extended insurance, its action would not have been binding upon the insured and he would have been entitled to demand the cash payment explicitly promised him."

It is the contention of the petitioner that, on the lapse of the policy, the dividend of $74.80 should have been applied in reduction of the amount advanced against the surrender value of the policy, thus raising what remained of that value from $11.12 to $86.92, a sum sufficient to extend the insurance until after the death. But the policy gave no warrant for an application of the dividend to the reduction of advances against the policy. As this Court pointed out in *Board of Assessors of Orleans County* v. *New York Life Insurance Co.*, 216 U. S. 517, 522, such advances being against the surrender value do not create a "personal liability" or a "debt" of the insured, but are merely a deduction from the sum that the company "ultimately must pay." While the advance is called a "loan" and interest is computed in settling the account, "the item never could be sued for" and in substance "is a payment, not a loan." *Id.* The company had no right, without agreement with the insured, to apply a dividend, payable in cash, to the reduction of the advance against the policy.[2]

In the endeavor to support its contention, petitioner refers to a statement and a "cash surrender voucher" sent by the company to the insured under date of July 15, 1931. These papers were submitted for the signature of the insured but were not signed or approved by him. In them, the cash value of the dividend, or $74.80, was added to the cash value of the policy, and the amount of the advances against the policy with interest, together with a "balance on loan", ($81.10) on another policy, were deducted, leaving a "net cash surrender value available" of $4.82. The endeavor to

[1]See Hutchinson *v.* National Life Insurance Co., 195 S. W. (Mo.) 66; Atlantic Life Insurance Co. *v.* Bender, 131 S. E. (Va.) 806; Gardner *v.* National Life Insurance Co., 161 S. E. (N. C.) 308; Tonetich *v.* Home Life Insurance Co., 163 Atl. (Pa.) 673.

[2]See Wagner *v.* Theriot, 203 App. Div. (N. Y.) 757; 236 N. Y. 588.

treat this statement and proposed voucher as making the dividend a part of the surrender value is unsuccessful. Not only is this effort opposed to the clear terms of the policy but the papers themselves show that the "cash value" of the dividend was regarded as a separate item. These papers, so far as the present question is concerned, evidence neither an admission nor an agreement.

As there is no ambiguity in the provisions under consideration, there is no occasion for resort to the familiar principle that equivocal words should be construed against the insurer. While it is highly important that ambiguous clauses should not be permitted to serve as traps for policyholders, it is equally important, to the insured as well as to the insurer, that the provisions of insurance policies which are clearly and definitely set forth in appropriate language, and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill considered interpretations.

The remaining question is whether a different conclusion, as to the interpretation of the policy is required in view of the provision of Article 4732, Revised Civil Statutes of Texas, 1925, quoted in the margin.[1] Petitioner insists that the phrase "dividend additions", as used in the statute, means "dividends". The Circuit Court of Appeals disagreed with this view, holding that "dividend additions" are "paid up insurance in addition to the face of the

[1] The provisions of Article 4732 invoked by the petitioner are as follows: "No policy of life insurance shall be issued or delivered in this State, or be issued by a life insurance company organized under the laws of this State, unless the same shall contain provisions substantially as follows:

"7. A provision which, in event of default in premium payments, after the premiums shall have been paid for three full years, shall secure to the owner of the policy a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy, and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserve, less a sum not more than two and one half per cent of the amount insured by the policy and of any existing dividend additions thereto, and less any existing indebtedness to the company on the policy. Such provision shall stipulate that the policy may be surrendered to the Company at its home office within one month from date of default for a specified cash value at least equal to the sum which would otherwise be available for the purchase of insurance, as aforesaid, and may stipulate that the company may defer payment for not more than six months after the application therefor is made. This provision shall not be required in term insurances".

policy and purchased with dividends". We think that this construction is correct. It is in accord with the uncontradicted testimony which was given by actuaries upon the trial as to the general understanding of the phrase. It will be observed that the statutory provision refers to the reserve at the date of default on the policy "and on any dividend additions thereto". It thus refers to "dividend additions" upon which there would be a reserve, that is, it would seem plainly, to paid up insurance purchased by dividends, which would require a reserve. We also agree with the Circuit Court of Appeals that the case of *First Texas State Insurance Co.* v. *Smalley*, 111 Tex. 68, is not to be regarded as a construction of the phrase, as the present question was not before the court. The same is true of the case of *Occidental Life Insurance Company* v. *Jamora*, 41 S. W. (2d) 808. In *Great Southern Life Insurance Co.* v. *Jones*, 35 F. (2d) 122, relating to a similar statute of Oklahoma, the policy provided for guaranteed "premium reduction coupons" which were fixed liabilities requiring a reserve, and were not dividends in the proper sense as in the instant case. The ruling of the Court of Appeals of Kentucky in *United States Life Insurance Co.* v. *Spinks*, 126 Ky. 405, is met by the later decision of the same court in *Jefferson* v. *New York Life Insurance Co.*, 151 Ky. 609, 616, 617, where the Court held that the words "dividend additions" in the statute of Kentucky "has reference solely to paid up insurance". See, also, *Mutual Benefit Life Insurance Co.* v. *O'Brien*, 116 S. W. 750. We see no reason for attributing, under the statute of Texas, any other meaning to the terms of the policy in suit than that which would otherwise be regarded as their clear import.

The petition for certiorari in this case directed attention to what was deemed to be a conflict between the decision below and the decisions of other Circuit Courts of Appeals in *Harvey* v. *Union Central Life Insurance Co.*, 45 F. (2d) 78, and *Atlantic Life Insurance Co.* v. *Pharr*, 59 F. (2d) 1024. In the case of *Harvey*, the decision could, and did, rest on the fact that the period of extended insurance, to which the surrender value was applicable according to the provisions of the policy, ran from the effective date of the policy and, as thus calculated, the insurance extended beyond the date of death. So far as what was said by the court in that case may be regarded as bearing upon the question presented in the in-

stant case, it was, and was stated to be, unnecessary to the decision. In the case of *Pharr*, there were provisions in the policy, quite different from those before us, which were of doubtful meaning. The views expressed by the court may be taken as limited to the facts of the particular case.

The judgment of the Circuit Court of Appeals is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.